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No. _____

In The
# Supreme Court of the United States

BELINDA DUPUY, et al.,

*Petitioners,*

v.

ERWIN McEWEN, Director,
Illinois Department of Children and Family Services,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

When the Illinois Department of Children and Family Services ("DCFS") receives allegations made to the State telephone Hotline of child abuse or neglect, DCFS investigators implement "safety plans" at the outset of the ensuring investigations. The safety plans routinely require parents or children to leave their family home and/or have no contact or only restricted contact with each other from the very beginning of investigations until their conclusion.

This case is a class action brought by parents and other family members ("parents") affected by safety plans. The parents challenge the State's policies and practices giving rise to such plans.

The question presented is:

When a State has only "mere suspicion" of child abuse or neglect, does it deprive the parents and their children of their rights under the Due Process Clause of the Fourteenth Amendment when it:

(a) secures safety plans either by direction or by telling parents that if they refuse to agree to a plan, the State may take custody of the children and place them in foster care; and

(b) provides no opportunity to contest the plans?

## PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellants below, are named plaintiffs Belinda Dupuy, Pilar Berman, Norman Berman, Pearce Konold, Jeff Dupuy, V. A., G. A., T. A., R. F., A. H., and K. S., on their own behalves and on behalf of a certified class of persons defined as follows (Order, March 22, 1999, as amended by Order April 19, 2004):

(a) all persons (unless excluded as class members under the last paragraph of this definition) who have been, are being or will be named as perpetrators of child abuse or neglect in "indicated reports" (as defined in the Abused and Neglected Child Reporting Act, 325 ILCS 5/3) placed in the Illinois "State Central Register" (the "SCR," referenced in 325 ILCS 5/7.7) on or after June 17, 1995;

(b) all persons (unless excluded as class members under the last paragraph of this definition) who were named as perpetrators of child abuse or neglect in "indicated reports" (as defined in the Abused and Neglected Child Reporting Act, 325 ILCS 5/3) placed in the Illinois "State Central Register" (the "SCR," referenced in 325 ILCS 5/7.7) prior to June 17, 1995 if, on or after that date, the Illinois Department of Children and Family Services ("DCFS") discloses or will disclose such reports (or any information in such reports) to persons outside the SCR (including persons employed by DCFS or its assigns) other than the perpetrator, or such reports (or the information in such reports) are or will be accessed by such persons outside the SCR.

(c) the custodial parent or guardian of a class member as defined in ¶(a) or (b) herein, if the class member is under 18 years of age.

The persons referred to as being "excluded as class members" in subparagraphs (a) and (b) of the class definition are persons named as perpetrators in

indicated reports: whose reports have been removed from the SCR pursuant to 325 ILCS 5/7.14; or who have been parties to a criminal proceeding under the Illinois Criminal Code or a civil proceeding under the Illinois Juvenile Court Act, and in such a proceeding, a court, in a final non-appealable order, has determined that such acts or omissions upon which the indicated report is based constitute child abuse or neglect.

(d) any person (except an "excluded alleged perpetrator" under the language following this paragraph) who, on or after June 17, 1995, has been named, in a report to the DCFS Child Abuse and Neglect Hotline, as a possible perpetrator of child abuse or neglect or whom DCFS, in a child abuse or neglect investigation conducted (in whole or in part) on or after June 17, 1995, has investigated, is investigating or will investigate as a possible perpetrator of child abuse or neglect (any such "possible perpetrator" being referred to herein as an "alleged perpetrator") who during the pendency of any DCFS investigation of child abuse or neglect, or thereafter, has been, is or will be required by DCFS, under threat of protective custody, to adhere to and/or carry out one or more of the following conditions, put forth in any DCFS protective plan, safety protection plan, safety plan or directive:

> (1) a condition prohibiting or restricting, physical and/or verbal contact between any such person and his or her biological or adopted child, or, if the alleged perpetrator is a child, a condition prohibiting contact between the alleged perpetrator and his or her parents or legal guardians or any other adult relatives who live with the alleged perpetrator; or

> (2) a condition prohibiting any such person's spouse, child, parent or legal guardian from residing in the home with him or her.

A person who is an "excluded alleged perpetrator" under ¶(d) of this class definition is any alleged perpetrator who is also a person who has been or is a party to a criminal proceeding under the Illinois Criminal Code or a civil proceeding under the Illinois Juvenile Court Act, or a civil proceeding under the Illinois Marriage and Dissolution of Marriage Act, or any other civil proceeding adjudicating familial interests, and as the result of such a proceeding, there is in effect a court order that imposes on him or her conditions that are the same as the conditions in, or includes within it the conditions that are described in or referenced in ¶¶ (d)(1) or (d)(2).

As petitioners do not include a nongovernmental corporation, no corporate disclosure statement is required.

Respondent, defendant-appellee below, is the Director of the Illinois Department of Children and Family Services in his official capacity. The director is currently Erwin McEwen. His predecessor in office, who was a party to the proceedings below, was Bryan Samuels.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## CITATIONS OF OPINIONS AND ORDERS

The final decision and judgment of the Seventh Circuit as to which review is sought is reported at 495 F.3d 807 (7th Cir. 2007) and reprinted at App.1a-6a. An interlocutory decision and judgment of the Seventh Circuit, which would also be brought before this court for review if this petition is granted, is reported at 465 F.3d 757 (7th Cir. 2006) and reprinted at App.7a-19a. The cited Seventh Circuit 2007 decision and judgment affirmed district court orders, dated March 9, 2007 and February 26, 2007, that dismissed or noted the dismissal of plaintiffs' claims, which are unreported but are reprinted at App.20a and App.21a-23a. The cited 2006 decision and judgment of the Seventh Circuit nominally affirmed a district court injunction order in plaintiffs' favor, but ruled that plaintiffs were not entitled to any such relief. App.19a. That district court injunction order, which is unreported but reprinted at App.24a-28a, had implemented a district court memorandum opinion and order in plaintiffs' favor that is reported at 462 F.Supp.2d 859 (N.D. Ill. 2005) and reprinted at App.290a-101a. The order of the Seventh Circuit denying plaintiffs petition for rehearing, with a suggestion for rehearing en banc, of that court's cited 2007 decision and judgment is unreported but is reprinted at App.102a-103a.

## JURISDICTION

The final decision and judgment of the Seventh Circuit as to which petitioners seek review was entered on July 31, 2007. App.1a-6a. An

interlocutory decision and judgment of the Seventh Circuit, which would also be brought before this court for review if this petition is granted (*Reece v. Georgia*, 350 U.S. 85, 87 (1955), *Urie v. Thompson*, 337 U.S. 163, 171-72 (1949)), was entered on October 3, 2006. App.7a-19a.

On October 15, 2007, the Seventh Circuit denied petitioners' petition for rehearing, with a suggestion for rehearing en banc of the court's cited 2007 decision and judgment. App.103-104a. On December 17, 2007, Justice Stevens entered an order extending the time within which to file a petition for certiorari in this matter to and including February 13, 2008.

This Court has jurisdiction under 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, provides: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

### A. Plaintiffs' Complaint and the Proceedings Generally

In 1997, parents who had been reported for suspected child abuse or neglect filed this class action against the DCFS Director ("Director"). App.1a. Plaintiffs' complaint, which sought declaratory and injunctive relief, challenged a number of interrelated DCFS policies and practices, as violative of plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment. *Id.*; App.29a.

Plaintiffs' claims gave rise to two distinct proceedings.

In the first proceeding (*Dupuy I*), the district court found that DCFS used a "practically nominal" burden of proof in indicating accused persons as guilty of abuse in its investigations.[1] *Dupuy v. McDonald*, 141 F.Supp.2d 1090, 1140 (N.D. Ill. 2001), *subsequent injunction aff'd in part and rev'd in part*, 397 F.3d 493 (7th Cir. 2005). The district court also found a "staggering" 74.5% rate of error in the indicated reports DCFS investigators registered, as measured by the reversal rate for indicated finding appeals. 141 F.Supp.2d at 1136. The parties eventually settled *Dupuy I*.

The second proceeding (*Dupuy II*) concerned DCFS's safety plan policies and practices and gives rise to this petition.

## B. The *Dupuy II* Proceeding

In 2002, the plaintiffs initiated a second class preliminary injunction proceeding; they challenged DCFS's imposition of safety plans upon families absent objectively reasonable suspicion of parental abuse or neglect and without affording them any process to challenge plans. App.30a, 74a, 83a. An estimated 10,000 Illinois families per year (since 1995) have had DCFS safety plans imposed upon them. App.40a. Virtually all safety plans require major changes respecting parents' custody, care and supervision of their children. App.41a. Commonly,

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[1] An "indicated" finding of abuse or neglect is a non-criminal administrative determination at the conclusion of child abuse or neglect investigation. *Dupuy I*, 141 F. Supp. 2d at 1093. When the accused parent is exonorated, the case is "unfounded." *Id.* Indicated findings are registered in the State Central Register (*id.*), and are used in licensing and employment screening decisions, among other things. *Id.* at 1139. Pursuant to the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. § 5106 (a) and (b)(2)(A)(i), states receive federal assistance to operate their child abuse and neglect reporting and determination systems.

safety plans require that fathers or mothers (or both) leave their homes, that children reside with relatives, or that relatives move into the family home and supervise all contact between parents and children. *Id.* Some safety plans provide for no contact between parents and children during the entire duration of the plans. *Id.*

Following a 22-day evidentiary hearing in *Dupuy II* in 2002 and 2003, the district court issued its findings of fact, describing in detail the challenged DCFS safety plan policies and practices, including their application to ten identified plaintiff families. App.29a-71a. DCFS has never challenged any of the district court's findings of fact.

### 1. The Development, Implementation and Terms of Safety Plans

In 1995, Illinois adopted a procedure, not embodied in any statute or formal regulation, for implementing safety plans in its investigations of Hotline calls. App.14a. The Hotline accepts telephone calls alleging a suspicion of child abuse or neglect from any person (including anonymous callers) and then assigns these calls for investigation. App.31a. Hotline call screeners do not investigate the merits of calls before assigning them to investigators in field offices. App.31-32a. Pursuant to a risk assessment procedure, known as the Child Engenderment Risk Assessment Protocol ("CERAP"), DCFS investigators, within 48 hours of DCFS's receipt of a Hotline call, are required to designate allegedly abused or neglected children as "safe" or "unsafe" by utilizing a series of check boxes on the CERAP form, App.34-38a, 45a. The 48-hour point when DCFS investigators are expected to complete the CERAP, marks the outset of the "initial investigation," *Dupuy I*, 141 F.Supp.2d at 1095. At this point, investigators are expected to have made a good faith attempt to see each alleged child victim,

but are not expected to have interviewed any witnesses. *Id.*

The CERAP check box form first requires investigators to determine if any "safety factor" is present. App.34-38a. To be checked "yes," no safety factor requires any particular "'level of evidence.'" App.36a. Several of the safety factors are to be checked "yes" whenever an "allegation" of a particular type has been made. App.36-37a. Nine of the 15 safety factors are to be checked "yes" if any household member's behavior raises a concern, even if that household member is not the parent. App.37a.

If a safety factor is checked "yes," then the CERAP instructs investigators to determine if any family strength or mitigating circumstance controls for that safety factor, though any particular strength or circumstance, even if present, may be deemed insufficient to control for a safety factor. App.38-39a. If investigators determine that any one safety factor is present but not controlled for, CERAP directs investigators to deem a child "unsafe." App.39a. Upon reaching this conclusion, to be made within 48 hours of DCFS's receipt of a Hotline call, App.39a, 45a, the CERAP policies direct investigators to implement safety plans to which the parent or parents "agree," or, if there is no agreement, to take the child from the parents and into State custody at that time, App. 39a, 40a, 43-44a. A parent must therefore decide whether to agree to or reject a safety plan "on the spot," at the outset of the investigation, *see* App. 39a, 40a, 54a, 56-57a, 58-59a, 62a, 64a, 65-66a, 68a, 60-70a, and rarely, if ever, do they have counsel or any adviser to assist them in making that decision, *id.*

DCFS subjected Professors M. and S., who both teach at a major Chicago-area university, to a safety plan after an anonymous Hotline call alleged Dr. S. had abused their eight-year old adoptive

daughter. App.67a. Under CERAP, DCFS determined that the anonymous allegation against Dr. S., without any evidence, provided sufficient basis to decide that his daughter was "unsafe". App.35a (*i.e.*, factor #10); App.36a ("no level of evidence" needed to check a factor "yes"). Indeed, shortly after receiving the Hotline call, DCFS dispatched an investigator to the S. home who demanded that Dr. S. vacate his home immediately. App.68a. The investigator communicated to Dr. S. that, if he did not leave himself, DCFS would take their daughter into foster care. *Id.* Dr. S. complied. *Id.* In the ensuing investigation, DCFS never secured credible evidence supporting the anonymous Hotline call. App.68a.

As typified by the Dr. S. case, DCFS investigators do not inform parents of the reasons for the safety plan demand, including the safety factors DCFS finds present or the reasons it has concluded that a child is "unsafe." App.44a. Nor does DCFS ever give the CERAP determination form to parents. *Id.*

DCFS often presents its safety plan only to the child's "primary caregiver" rather than to the person accused or abuse or neglect. App.42a. For example, an anonymous person reported seeing James Redlin, a high school science teacher, tickle his six-year old son on a train. App.53a. After a Hotline call, a DCFS investigator called Susan Redlin, James's wife, and demanded a safety plan that required Susan, who is wheelchair bound, to provide 24-hour supervision of all contact between her husband and her son. App.54a. Another DCFS investigator telephoned pre-school teacher Stacey DeLaFont after DCFS received a Hotline call concerning alleged abuse of a pre-school child by her husband Patrick, also a teacher in the same pre-school. App.58a. The investigator demanded that Mrs. DeLaFont evict her husband Patrick from their home, even though the DeLaFonts' own children were not the subjects of

any accusation. App.58-60a. DCFS did not confer with Patrick for more than a week after he left his home, and when an investigator did meet with him, she did not allow him to return home. App. 59a. As in the S. and Redlin cases, the allegations against Patrick DeLaFont eventually were "unfounded," though not until he had lived apart from his family for 11 months. App. 60-61a.

In creating safety plans, it is sometimes "'impossible ... for the Department to obtain . . . express agreement to the plan [by a parent or parents].'" App. 46a (ellipses in original). Also, DCFS sometimes presents safety plan conditions as oral directives as to which no written agreement is requested (as in the DeLaFont case, App.58a, 59a), and it treats "mere action in conformity with a DCFS request" as "agreement" to a safety plan. App.45a.

Because DCFS often presents safety plans to only one parent, in many cases, only one parent "sign[s] the safety plan form." App.42a. That form contains preprinted standard language stating that "failure to agree to the plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home." App.43a. The form contains no information about the evidence required to take children into protective custody or the legal procedure for challenging such a removal. App.42-43a, 44a.

DCFS Supervisor Beckelman told Stacey DeLaFont that if her husband Patrick remained in the home, contrary to the safety plan, "Beckelman would remove the children from the home." App.59a. DCFS Investigator Abernathy told child care provider Christine Parikh that "'if [her husband] Jimmy did not move out of the house and cease all contact with the minor children living in his home,

the children would be taken into DCFS custody." App.62a.

"[V]irtually every parent or caretaker confronted with a safety plan [whom DCFS asks to sign such a plan] ends up signing it." App.43a. Although, since 1995, an estimated 10,000 families per year were subject to safety plans (App.40a), DCFS has never "identified a single family that... chose to reject the plan." App.93a. "Nearly every class member witness who signed a safety plan testified that the investigator simply presented a proposed plan for his/her signature with little or no discussion of the plan terms or alternatives." App.40a.

Most investigations (approximately two-thirds) end with a DCFS determination that the allegations are unfounded. App.31a. DCFS Child Protection Manager Anne Gold acknowledged at the trial that "'for the cases that end up getting unfounded in [her] office, the likelihood that [DCFS] would have grounds for . . . [taking] custody [of a child if the parent did not agree to a safety plan] . . . is about zero." App.45a.

Safety plans generally continue throughout an investigation. App.49a. DCFS has 60 days to complete investigations, but may extend the time and often does, App. 32a (*citing Dupuy I*, 141 F.Supp.2d at 1106-1130), so that safety plans remain in effect for many families for several months or more. Safety plans may continue in some cases after the investigation is over and even if the allegations are unfounded. App.49a. The safety plan for the DeLaFont family remained in effect for 11 months (App.58a, 61a), and the plan for the D. family remained in effect for 18 months, App.69-70a.

The district court concluded that class members whose lives are disrupted by safety plans which require family members to live outside the home or which restrict contact between family

members suffer "irreparable harm." App.99a. For example, while Susan Redlin was wheelchair bound, her family's safety plan required her to supervise all of her son's interactions with his father James; because of the great difficulty of transporting Susan outside the home, this plan effectively consigned the family members to being "'prisoners' in their own home" for the plan's three-month duration. App.53-55a. The DeLaFont family's plan required Patrick DeLaFont to leave his home and have no contact with his children (although there were no allegations regarding mistreatment of them); DCFS later relaxed this requirement to permit him to see his children at church on Sunday. App.58-59a. The D. family's safety plan first required 16-year-old E.D. to remain outside his own home. App.69a. Weeks later, however, DCFS modified the plan to permit E. D. to return home, provided that he have "no contact with younger children." App.70a. "In addition, [the plan required] Mrs. D. . . . to remain 'awake at night when the rest of the family is sleeping, in order to supervise [E. D.] at night.'" *Id.*

"DCFS has no procedure authorizing those subject to a safety plan to contest it in any way." App.49a.

### 2. The District Court's Conclusions and Its Injunction Order

The safety plan form tells parents that if they did not agree to a safety plan, DCFS "may" take custody of their children. App.92a. The district court found that although this "language may not by itself constitute a threat of actual removal" (*id.*), "most class member witnesses testified at the hearing that . . . the investigator affirmatively threatened to take away Plaintiffs' children unless they agreed to a safety plan," App.93a. After considering the safety plan form together with "investigator[s'] [statements] affirmatively threaten[ing] to take away Plaintiffs' children unless

they agreed to a safety plan," the district court found that DCFS made "threat[s] sufficient to deem the family's agreement [to safety plans] coerced." *Id.* In support of this finding of fact, the district court stated that "[s]ignificantly, [DCFS] has not identified a single family that, faced with such an express or implied threat of protective custody, chose to reject the plan." *Id.*

The district court held that plans remaining in effect for longer than a "brief" duration would violate due process. App.94a. Subsequently, the district court entered a preliminary injunction order that established an informal process for review of safety plans after ten working days, exclusive of weekends. App.27a.

The parents appealed on the ground that the relief order was inadequate. App.2a, 7a. DCFS did not cross-appeal. *Id.*

### 3. The Seventh Circuit's Interlocutory Decision

DCFS's principal defense on appeal was the same as it presented to the district court: parents voluntarily agreed to every plan that DCFS had ever implemented, or would ever implement. *See* App.27a (district court notes DCFS's "consistent position" that safety plans are "voluntary").

On October 3, 2006, the Seventh Circuit affirmed the district court's injunction order, but only because DCFS had not cross-appealed (App.19a); effectively, it reversed that order, *id.*

The Seventh Circuit acknowledged that safety plans involved the imposition of "restrictions," such as requiring the child or parent to leave the home, and that these restrictions involved "curtailments of parental rights" that were "invasive enough to count as deprivations of liberty, thus triggering the right to a hearing." App.13a. But it denied the State's

imposed restrictions effected constitutionally cognizable deprivations on the ground that all "safety plan[s are] voluntary." App. 15a. "Critically," the court said, "the decision to agree to the safety plan is optional with the parents" (App.13a), since "[t]he state does not force a safety plan on the parents; it merely offers it," App.14a. The Seventh Circuit concluded that DCFS need not afford plaintiffs any due process protections. *Id.* It held that the State could "offer" safety plans upon "mere suspicion" of abuse and neglect, which the court defined as "some inarticulable hunch," App.15a. It held as well that the plaintiffs were not entitled to a hearing to contest safety plans to which they had voluntarily agreed. App.14a.

The Seventh Circuit recognized that DCFS secures safety plans by telling parents that "in lieu of [DCFS] immediately removing the child," the parent has the "option" to "leave the house" or stay away from the child unless a "designated family member is present." App.13a. But it held that there is nothing "forbidden" or "objectionable" (App.15a) about a state official making a threat (*e.g.*, taking custody of children from their parents) to "coerce[e] an agreement" unless the coercion used to secure that agreement itself employs an "illegal means." App. 17a. The only example the Seventh Circuit offered of "illegal means" were threats that involved "*knowing*" misrepresentations, App.17a (emphasis in original); *accord*, App. 19a.

The Seventh Circuit termed safety plans a "boon to parents" (App. 17a), and stated that it could not understand how parents are "made worse off by being offered a safety plan." App.16a. It elaborated: "It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini?" *Id.*

### 4. The District Court's Dismissal Order, and the Seventh Circuit's Final Decision

On remand, DCFS moved for summary judgment. In the briefing accompanying that motion, the parents conceded that they could not establish that DCFS implemented safety plans by the "illegal means" of knowing misrepresentations. App.2a. They explained their concession, in part, by noting that DCFS policy provides for implementation of safety plans right at the outset of its "initial investigation," 141 F.Supp.2d at 1093, of the Hotline call allegations and before conducting any meaningful investigation, *see* pp. 4-5, *supra*. Because DCFS investigators have little or no evidence when they secure safety plans, they are not in a position to *mis*represent the evidence.

The district court granted judgment to DCFS and dismissed the plaintiffs' safety plan claims. App.21a, 22-23a. Plaintiffs appealed. The Seventh Circuit, however, affirmed the dismissal based on its interlocutory decision, observing that plaintiffs presented the same arguments as in their earlier appeal. App.3a. The Seventh Circuit thereby incorporated its earlier interlocutory ruling into its final decision. For this reason, plaintiffs refer in this petition to the Seventh Circuit's two rulings as a single decision.

## REASONS FOR GRANTING THE WRIT

### I. INTRODUCTION

The "interest of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Accordingly, the Third Circuit has held that respect for families' fundamental liberty interests forbids a State from requiring a

parent to live apart from his children except upon "*reasonable and articulable evidence* giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Croft v. Westmoreland County Children & Health Servs.*, 103 F. 3d 1123, 1126-27 (3d Cir. 1997) (emphasis added). The Third Circuit also has held that this evidentiary requirement is not obviated by offering parents a "choice" of having their children taken into foster care or leaving their home. Such a "choice" is "blatantly coercive," *id.* at 1125 n.1, and the resulting exercise of that "choice" is therefore not voluntary, *id.* at 1125.

The Seventh Circuit, in the decision below, created a conflict with this precedent. DCFS has a policy and practice of telling parents that the State may take their children into custody and place them into foster care if they do not agree to "safety plans" that require separation from or substantial restrictions on contact with their children. Yet the Seventh Circuit held that the due process clause *permits* Illinois to effect safety plans based on "mere suspicion" of abuse or neglect (App.15a), which it described as "some inarticulable hunch," *id.* It also held that all safety plans are voluntary. *Id.* The Seventh Circuit's decision therefore conflicts with *Croft*, twice over. *See* § II, *infra*.

The Seventh Circuit's decision also contravenes this Court's precedents.

In securing safety plans based upon a "mere suspicion" of parental abuse or neglect—a policy and practice the Seventh Circuit approved—DCFS essentially puts parents to a "bet the children" choice: either they must "agree" to the DCFS-devised plan restricting parents' and children's contact with each other or run the risk that the State will take the children into State custody. However, under this Court's decisions, which dictate that the State may not constitutionally restrict parents'

liberty interests in the care and custody of their children when there is no *evidence* of parental wrongdoing, the Due Process Clause prohibits putting the parents to such a choice. *See* § III, *infra*. Furthermore, the Seventh Circuit's suggestion that the agonizing choice at the center of this case – between leaving one's family or having one's children taken into State custody – is no different than choosing between a "Martini" or a "Manhattan" at a cocktail party (App. 16a), trivializes the family's fundamental liberty interests. It ignores the "momentum for respect" (*Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citation omitted)), that this Court has repeatedly accorded the parental liberty interest in raising children.

The Seventh Circuit's holdings that all safety plans are voluntary and that the State need not provide any process to contest plans impairing parents' fundamental liberty interests also cannot be reconciled with the Court's decisions. *See* §§ IV-V, *infra*.

## II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE THIRD CIRCUIT'S DECISION IN *CROFT*

In *Croft*, a caller to a child protection Hotline "informed" the county that Dr. Croft "was sexually abusing his [four-year old] daughter." 103 F.3d at 1124. Upon meeting with Dr. Croft and his wife, the investigator told Dr. Croft that "unless he left his home and separated himself from his daughter until the investigation was complete, she would take the daughter from their home that night and place her in foster care." *Id.* "Faced with this dilemma, Dr. Croft complied with her ultimatum and left his home, wife, and daughter." *Id.* at 1125.

*Croft* and the Seventh Circuit's decision create a circuit split on two issues.

**1.** According to *Croft*, the due process clause requires "reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse" (*id.* at 1126), before the State employs means to separate parents from their children – such as presenting the "choice" it required Dr. Croft to make, or the identical choice that DCFS requires parents here to make when it proffers safety plans to them. *Croft* held that substantive due process requires reasonable and articulable evidence to proffer that "choice." *Id.* In contrast, the Seventh Circuit held that DCFS can separate parents from their children by requiring parents to "choose" between proffered safety plans or risk having their children taken into State custody based upon a "mere suspicion" of wrongdoing. App.15a.

Straining to distinguish *Croft*, the Seventh Circuit said that the "threat" (App. 18a) to place the child in foster care if Dr. Croft "didn't leave the family home immediately" was "not grounded in proper legal authority." *Id.* The suggestion is that DCFS's threats to take custody of children if parents refuse safety plans *are* grounded in such authority. Yet, as the Seventh Circuit conceded, "mere suspicion" of abuse or neglect "is *not* a statutory ground [in Illinois] for actually removing a child from his parents' custody." App.15a (emphasis added). The Seventh Circuit's attempt to distinguish *Croft* therefore fails under its own concession that "mere suspicion" is no more "proper legal authority" for Illinois to threaten taking custody of a child than it was for Pennsylvania to do so. *See Croft*, 103 F.3d at 1126.

**2.** The second split concerns whether a State's threats to take a child into State custody if the parent does not leave the home are unconstitutionally coercive, as *Croft* held, or, by contrast, whether parents' acquiescence to such threats is always voluntary, as the Seventh Circuit

held. In *Croft*, the investigator told Dr. Croft that "unless he left his home and separated himself from his daughter until the investigation was complete, she would take the daughter from their home that night and place her in foster care." The Third Circuit called this statement an "ultimatum." 103 F.3d at 1125. The Third Circuit "explicitly reject[ed]" the defendants' characterization of Dr. Croft's "choice" to leave his home and his wife and his daughter as "voluntary," stating that the investigator's ultimatum was "blatantly coercive" and that attempts to portray the Dr. Croft's decision as "voluntary" were "not well-taken." *Id.* at 1125, n.1.

The district court likewise found that "investigators affirmatively threatened to take away Plaintiffs' children unless they agreed to a safety plan." App.93a. And the record is replete with specific examples of just such threats, which are indistinguishable from the one that the county child welfare authorities directed to Dr. Croft, *see* pp. 6-7, *supra* (citing examples from record). Yet, in conflict with the Third Circuit in *Croft*, the Seventh Circuit held that parents' choices to accept safety the plans here, exacted by such threats, are always voluntary.

## III. THE SEVENTH CIRCUIT'S DECISION ALLOWING DCFS TO "OFFER" SAFETY PLANS UPON "MERE SUSPICION" CONFLICTS WITH THIS COURT'S DECISIONS

In *Troxel v. Granville*, 530 U.S. 57 (2000), this Court reiterated that the "interest of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65. *Accord, M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("[c]hoices about marriage, family life, and the upbringing of children are among the associational rights that this Court has ranked as 'of basic importance in our society'") (citation omitted).

In *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), this Court stated that "[w]e have little doubt that the Due Process Clause would be offended '[i]f a State were to *attempt to force* the breakup of a natural family, over the objections of the parents and their children, *without some showing of unfitness* and for the sole reason that to do so was thought to be in the children's best interest'" (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J. concurring in judgment)) (emphasis added). Yet, the Seventh Circuit held that "mere suspicion," which it defined as some "inarticulable hunch" (App.15a), suffices for the State to "offer . . . a safety plan" (App. 16a), which restricts the family's choice to remain together.

When DCFS investigators present safety plans to parents, they are not required to have evidence establishing an *objectively reasonable* suspicion of wrongdoing. And rarely do they have such evidence, since DCFS proffers safety plans at the outset of its investigation, following a Hotline call as to which there has been no meaningful investigation. *See* pp. 4-5, *supra*. Indeed, DCFS never secures credible *evidence* in most cases, given that it ultimately determines two-thirds of the Hotline allegations to be unfounded. App. 31a.

DCFS's safety plan practices, which the Seventh Circuit approved, do precisely what *Quillion* says the Due Process Clause forbids. Indeed, DCFS's "offers" – that parents and children separate or restrict their contact with each other or risk having the children taken into State custody -- are more than mere "*attempt[s]*" to "force the breakup of a natural family." *Quillion*, 434 U.S. at 255 (emphasis added). They are practices that invariably *succeed* in forcing such family breakups, since no parents reject plans. App.93a. Moreover, *Quillion* establishes that the Due Process Clause affords no authorization to make such "offers" (App. 14a) at all absent *evidence* of parental wrongdoing: when *Quillion* says that, to

force the breakup of the natural family, a "showing of unfitness" (434 U.S. at 255) is required, that "showing" anticipates *evidence of* wrongdoing, not simply an "inarticulable hunch" (App.15a) of wrongdoing, the standard the Seventh Circuit approved. *Accord, Troxel*, 530 U. S. at 68 (invalidating state law permitting judges to override parent's limitations on grandparent visits that the judge believed not to be in the best interests of children, when "*no court ha[d] found . . . [the parent] unfit*") (emphasis added).

The Seventh Circuit characterizes each safety plan "offer" as affording an "option" to parents: to agree to a safety plan (and its prohibitions and restrictions on family life) or to refuse to agree and thereby risk having children taken into foster care. App. 13a. But *M.L.B.* characterizes "*[c]hoices* about marriage, family life, and the upbringing of children [as] among the associational rights this Court has ranked as 'of basic importance in our society,'" 519 U.S. at 116 (citation omitted) (emphasis added). *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997), in turn, says that the "substantive component" of the Due Process Clause "provides heightened protection against *governmental interference* with [these] fundamental rights and liberty interests") (emphasis added). *And see Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside *first with the parents*, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder*") (emphasis added). It follows that when DCFS, absent evidence of parental wrongdoing, substitutes its *own* judgment for that of the parents as to the "option[s]" (App.13a) that are in the "best interests of the[] children," *Troxel*, 530 U.S. at 68, it preempts the parents' authority as decision makers in violation of their fundamental liberty interests. Further, when DCFS proffers to parents choices between just two "options," both of which would severely

"curtail[]" (App.13a) parents' association with their children, DCFS impairs parents' fundamental liberty interests.

The Seventh Circuit analogizes the State's "offers" of safety plans to plea bargains. App.14a. But a State may not proffer a "choice" to a criminal suspect of pleading guilty to lesser offense or facing trial on a greater one, unless it *first* establishes "probable cause" to believe the suspect has committed the greater offense. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). In contrast, DCFS needs no evidence of wrongdoing to proffer safety plans to parents, but only an "inarticulable hunch" (App.15a) of it. If the Seventh Circuit's analogy were apt, DCFS could not proffer safety plans absent reasonable suspicion of abuse or neglect.

When a person is offered a "Martini or a Manhattan" (App.16a), he always retains the option of declining both drinks. Though it has no evidence of parental wrongdoing, DCFS does not offer parents the option of no restrictions on their family life when it "offers" safety plans.

## IV. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS DEFINING WHEN AGREEMENTS ARE COERCED OR, IN CONTRAST, VOLUNTARY

The Seventh Circuit held that safety plans agreements are voluntary, so that DCFS need not afford parents due process protections that involuntarily-imposed plans would require. But DCFS secures some safety plans not by signed agreement but by oral directives that a parent is to leave the home. App.45a, 58-59a. Such directives are not "voluntary" agreements.

In rejecting the parents' contention that plan agreements are often coerced, that Seventh Circuit held that "coercion is objectionable" only if the State

uses "illegal means . . . to obtain" safety plans. App.15a. The only example the Seventh Circuit offered of such "illegal means" was a knowingly false representation. App.17a. It concluded that because DCFS does not employ such misrepresentations or other "illegal means" of coercion, safety plans are voluntary. App.15a.

Even on its own terms, the Seventh Circuit's determination that all safety plans are voluntary is dubious. For, as it acknowledged, DCFS investigators routinely imply to parents that DCFS has "lawful grounds" to take custody of their children when it has no such grounds, but only "mere suspicion" (App.14a-16a) of wrongdoing. Such DCFS representations about "lawful grounds" *are* therefore *misrepresentations.*

Under this Court's decisions, coercion does not require a showing of "illegal means," so the Seventh Circuit's conclusion that safety plans are never coerced is incorrect. *See* § IV.A, *infra.* Moreover, its related determination that safety plans are voluntary contradicts the well-established "totality of the circumstances" test for voluntariness that this Court's decisions establish. *See* § IV.B, *infra.*

### A. The Seventh Circuit's Decision Conflicts with this Court's Decisions Defining Coercion or Duress

Numerous decisions of this Court establish when illegal means are used to secure an agreement or action, such means may vitiate the voluntariness of the agreement or action. *E.g., Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960). Yet this Court's decisions also establish that the government may be deemed to have coerced agreements from its citizens even when it does *not* employ "illegal means" to secure them. The Seventh Circuit cites no authority for its view that the *singular* test for

adjudging whether the State has "coerced" an agreement is whether it has used "illegal means."

In *Steffel v. Thompson*, 415 U.S. 452 (1974), police told Steffel that if he did not stop handbilling, he would be arrested under a trespass statute. *Id.* at 455. Steffel left to avoid arrest and did not return, but brought an action seeking a judgment that the trespass statute was unconstitutional. *Id.* at 454-55. In *MedImmunine v. Genentech*, 127 S. Ct. 764 (2007), this Court discussed whether Steffel's nominally "'voluntary' refusal to distribute handbills" had been "coerc[ed]." 127 S. Ct. at 775 n.12. This Court held that Steffel's conduct had been coerced because of the "penalties for . . . trespass [with which Steffel was] threatened" – even though the risk to Steffel was uncertain. *Id.* *See* 415 U.S. at 456 (he "*might be* arrested") (emphasis added), *id.* at 515-16 (if charged, he might be acquitted). Similarly, in *Terrace v. Thompson*, 263 U.S. 197 (1923), the State threatened the plaintiff landowner with forfeiture of the leasehold interest in a farm if he leased it to an alien in violation of a state statute. *Id.* at 211-12. As *MedImmune* explained, the landowner's nominally voluntary action in "simply not doing what he claimed the right to do (enter into a lease . . .)" was "effectively coerced," 127 S. Ct. at 772 (citing *Terrace*, 263 U.S. at 215-16), because of the "genuine threat of enforcement" of the statute. *Id.* Moreover, as in *Steffel*, it was uncertain whether, even if the landowner in *Terrace* had leased the farmland to an alien, the landowner would suffer the threatened forfeiture, since the state statute might be determined invalid in state civil or criminal proceedings to enforce it, *see Terrace*, 263 U.S. at 215.

*Steffel* and *Terrace* establish that the seriousness of the threatened harm if citizens do not acquiesce to the State's demands or requests may oblige the conclusion that their acquiescence has been coerced. More specifically, the "coercion

principle," *MedImmune*, 127 S. Ct. at 775 n.12, grounding both decisions does not turn on whether the State uses "illegal means" to secure acquiescence, *or* that the "consequences" threatened are "illegal" *or* certain. *Accord id.* ("We find the threat of treble damages [by respondent] and loss of 80% of petitioner's business . . . coercive . . . . [T]he *consequences of* the threatened action in this case [are determinative].) (emphasis added). *See Frost v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) ("constitutional guarantees . . . are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lack none of the elements of compulsion").[2]

The seriousness of the harm that DCFS threatens if the parents do not agree to the DCFS safety plans—the State taking custody of the children and placing them in foster care—is far more serious than the "modest penalties for misdeameanor trespass" in *Steffel* that the *MedImmune* Court considered "coercive," 127 S. Ct. at 775 n.12.

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2 This Court's constitutional and federal common law duress jurisprudence is rooted in the state common law. *See Dickerson v. United States*, 530 U.S. 428, 422 (2000). State Supreme Court common law duress decisions, but not the Seventh Circuit's decision, therefore are in line with the cases like *Steffel, Terrace, MedImmune and Frost. See Haston v. Crowson*, 808 So.2d 17, 22 (Ala. 2001) ("the doctrine of . . . duress [applies when] . . . unjustified demand are made, under such circumstances that the victim has little choice but to accede thereto") *Capps v. Georgia Pac. Corp.*, 253 Ore. 248, 253, 453 P.2d 935, 938 (1969) (choice of signing release or facing expensive litigation to recover money owned presents claim of duress, citing with approval Restatement (Second) of Contracts 938 § 492 (1932) for the rule that "[d]uress . . . means . . . any wrongful threat of one person . . . that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement").

Moreover, while the Seventh Circuit noted that the safety plan form "just notifies the parents of the lawful measures that *may ensue*," App.16a (emphasis added), those "measures" (the State taking custody of children) are no more uncertain than were the threatened consequences in *Steffel* and *Terrace*.

Further, the Seventh Circuit did not question that, out of tens of thousands of parents to whom DCFS has "offered" plans, not one has ever refused a plan. *See* App. 93a. Accordingly, the Seventh Circuit's contention that parents have only "to thumb their nose at the offer [of safety plans]" (App. 15a) does not describe parents' actual understanding of their options. *See, e.g.*, App. 62a. Indeed, that no parents ever actually thumb their noses at safety plans suggests that most, if not all of them, view DCFS as very likely if not certain to carry out its threats to take custody of the children if they do not agree to the plans. And, while the threat of serious harm, of itself, may make a threat coercive, *see* cases cited in § IV.A. *supra*, the apparent likelihood or certainty of such harm makes the threat even more coercive. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22, 32 (1990) (where tax payer is certain of tax penalty for late payments, timely payments are exacted "under duress"). More importantly, even if parents deem the risk slight, duress remains, for no reasonable parent would refuse a safety plan and thereby "bet their children" that DCFS would not take custody of the children from them, *see* § III, *supra*.

### B. The Seventh Circuit's Decision Conflicts with this Court's Decisions Defining a "Totality of All the Surrounding Circumstances" Test for Voluntariness

In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court held that whether an individual's agreement or consent is a *voluntary* waiver of a protected liberty interest is to be determined by the

"totality of all the surrounding circumstances," *id.* at 226, and that the government has the burden of proving consent. *Id.* at 222. *See Dickerson*, 530 U.S. at 433 (reaffirming continuing vitality of "totality of all the surrounding circumstances" as the applicable "due process . . . test" for voluntariness).

Under *Schneckloth*, a threat of serious harm may be a "circumstance" that, by itself, vitiates the voluntariness of agreements the State secures. *See* cases cited in § III.A *supra*. But coercive threats are just one of many "circumstances" that may do so. Others include: (a) unequal bargaining power between the parties (*D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972)); (b) a party's "lack of education" or "low intelligence" (*Schneckloth*, 412 U.S. at 226); (c) a party's lack of sufficient information to make an informed decision (*id.*); (d) the time pressure on a party to agree, and a party's lack of access to counsel or advisers to decide whether to agree (*Lynumn v. Illinois*, 372 U.S. 528, 534 (1963)); (e) "the characteristics of the accused," such as the "possibly vulnerable subjective state of the person who consents," (*Schneckloth*, 412 U.S. at 229).

The absence of any one or more "circumstance(s)" does not dictate that an agreement is "voluntary." *See Florida v. Bostick*, 501 U.S. 429, 437, 439 (1991) (lower court erred in resting its conclusion that there was no seizure "on a single fact–that the encounter took place on a bus–rather than on the totality of the circumstances").

The Seventh Circuit's default, in terms of the "totality of all the surrounding circumstances" test that *Schneckloth* prescribes, is that, in adjudging that the safety plans are always voluntary, it considered but a *single* "circumstance": whether DCFS had employed "illegal means," such as knowing misrepresentations (App.2a, 19a), to secure safety plans. Such an analysis is erroneous on its

own terms. *See* § III.A., *supra*. But, precisely because the Seventh Circuit considered only this single circumstance, it also cannot be squared with *Schneckloth* and its companion decisions cited in this section. The district court made many findings, not questioned by the Seventh Circuit, of "surrounding circumstances" *apart from* the threats that the Seventh Circuit erroneously dismissed as *not* unconstitutionally coercive, that would have supported a conclusion that many, if not substantially all, safety plans are involuntary.[3] Moreover, the court of appeals applied its "single circumstance analysis" to some cases where there was no safety plan agreement with the parents but only a directive, or where such an agreement was with one of the parents only, *see* p. 7, *supra* (citing to district court findings, also not questioned by court of appeals). In these cases, without any agreements between a parent and DCFS, there can be no *voluntary* agreement. *See also Georgia v. Randolph*, 547 U.S. 103, 114-17 (2006) (wife has "no recognized authority in law or social practice" to consent to police search of marital home, when her husband objects to search).

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[3] *See* App.40a, 43a, 44a, (re: parents and DCFS have unequal bargaining power: "[n]early every class member witness who signed a safety plan testified that the investigator simply presented a proposed plan for his/her signature"; "virtually every parent or caretaker confronted with a safety plan ends of signing it"; "little or no discussion of the plan terms or alternatives"); *id.* (re: lack of information: DCFS gives parents no information permitting them to make an informed choice; "families [do not] receive a copy of the CERAP Safety Determination Form, which details the underlying basis for the safety plan"); App.54a, 62a, 65a (re: "characteristics of the accused," including the "possibly vulnerable subjective state of the person who consents:" *e.g.*, "frantic" mother (Christine Parikh); disabled mother and family left "prisoners" (Redlins); mother with history of bipolar disorder and depression (Debra C.)).

## V. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING PROCEDURAL DUE PROCESS FOR PERSONS DEPRIVED OF LIBERTY INTERESTS

The Seventh Circuit acknowledged that if safety plans involuntarily separate parents from their children, or impose significant restrictions on their contact with each other, then DCFS is constitutionally required to afford the parents some process to contest the plans. App.13a. Numerous decisions of this Court confirm this conclusion. *See, e.g., Reno v. Flores*, 507 U.S. 292, 306-07 (1993); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). The Seventh Circuit nevertheless rejected plaintiffs' procedural due process claim based solely on its determination that all safety plaintiffs are voluntary. App.13a; App.14a ("There is no right to a hearing when . . . . [t]he State does not force a safety plan on the parents."). Because this determination is erroneous, *see* § IV *supra*, the Seventh Circuit's corresponding rejection of the parents' procedural due process claim is erroneous as well.

Critically, the Seventh Circuit misstated the procedural due process claim the parents advanced when it said that they sought "a hearing *before* they are offered the option of agreeing to . . . a [safety] plan." App.14a (emphasis added). The parents never made any such plea. Throughout the litigation, the parents maintained that the Due Process Clause permits procedural protections to be afforded *after* a safety plan is imposed so long as the post-deprivation process is prompt and meaningful. The parents' argument in the Seventh Circuit thus was that the district court erred in affording them constitutionally inadequate *post-deprivation* process to contest the *imposition* of safety plans. In advancing this limited argument, the parents drew upon the decisions of this Court that establish that, even when the State threatens to impose constitutionally cognizable

deprivations, it need not provide pre-deprivation process when exigent circumstances require quick action or it would otherwise be impractical to provide pre-deprivation process. *E.g.*, *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Barry v. Barchi*, 443 U.S. 55, 66 (1979). Such exigent circumstances are certainly present in cases in which DCFS claims reasonable suspicion of wrongdoing, based on evidence that a parent has abused or neglected a child. Whether DCFS in fact has the requisite evidence would be the usual issue at any post-deprivation hearing, making such a hearing analogous to a post-arrest probable cause hearing in the criminal process.

The Seventh Circuit said that a "safety plan seems a sensible . . . solution" (App. 17a-18a), suggesting that what the court (incorrectly) describes as the parents' plea for *pre-deprivation* process, if approved, would seriously jeopardize DCFS's efforts to "protect [ ] [children] against abuse and neglect," *id.* at App. 18a. But as explained, the parents pressed no such plea, and the district court, citing DCFS's own experts, concluded that "it would not be difficult for DCFS to develop a simple and inexpensive procedure for Plaintiffs to seek review of safety plans [after the plan has been in effect]." App.96a.

The Seventh Circuit held "the offer of a [safety plan] settlement no more impairs those [procedural due process] rights than a prosecutor's offer to accept a guilty plea impairs the defendant's right to trial by jury." App.14a. But that analogy illuminates the error in the Seventh Circuit's analysis. A criminal defendant's agreement to a plea offer, incident to entry of a guilty plea, comes after the State's negotiations with the defendant's counsel (defendant's representation by counsel being constitutionally assured), with reasonable time afforded the defendant to consider the merits of the plea offer in light of the evidence. Moreover, *before* the trial judge accepts a defendant's guilty plea on

which the plea agreement is conditioned, the judge is required to ensure that the defendant understands and knowingly intends to waive *all the procedural rights* (*e.g.*, a right to trial by jury) that he would have if he refused the plea offer and put the government to its burden. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). In contrast, parents proffered a safety plan must decide immediately whether to accept or reject the plan and rarely, if ever, do they have the advice of counsel or any adviser to assist them in making this decision. *See* pp. 4-5, *supra*. Nor does DCFS have any procedures in place under which a neutral person even inquires whether parents' agreements to the plans were knowing and voluntary ones. *See* App.49a.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

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United States Court of Appeals,Seventh Circuit.
Belinda DUPUY, et al., Plaintiffs-Appellants,

v.

Erwin McEWEN, Acting Director, Illinois Department of Children and Family Services, Defendant-Appellee.

**No. 07-1655.**

Submitted April 25, 2007.
Decided July 31, 2007.
Rehearing and Suggestion for Rehearing En Banc Denied Oct. 15, 2007.

Jack L. Block (submitted), Reed Smith, Jeffrey B. Gilbert, Johnson, Jones, Snelling, Gilbert & Davis, Robert E. Lehrer, Lehrer & Redleaf, Diane Redleaf, Redleaf Law Firm, Chicago, IL, for Plaintiffs-Appellants.

William G. Sullivan (submitted), Martin, Brown & Sullivan, Jack J. Carriglio, Meckler, Bulger & Tilson, Chicago, IL, for Defendant-Appellee.

Before EASTERBROOK, Chief Judge, and POSNER and EVANS, Circuit Judges.

POSNER, Circuit Judge.

This class action suit by parents, now in its eleventh year, challenges a range of practices by the child-welfare agency of the State of Illinois that are claimed to infringe parental rights protected by the due process clause of the Fourteenth Amendment. The case has twice been before us. *Dupuy v. Samuels,* 397 F.3d 493 (7th Cir.2005), 465 F.3d 757 (7th Cir.2006). In the second case, while affirming a preliminary injunction because the defendant had

not appealed from its entry (instead the plaintiffs had appealed, contending the injunction didn't go far enough-we rejected the contention), we expressed, by way of guidance for the trial on the merits (only a *preliminary* injunction had been granted), our doubt about its soundness. The preliminary injunction required administrative review before the child-welfare agency could offer parents a "safety plan" in lieu of removing a child that it suspected of being neglected or abused from its parent's custody. (The safety plan might, for example, require that one of the parents move out of the home until the question of abuse or neglect was resolved.) We pointed out that as long as the parents weren't coerced to accept a safety plan by being given false information about the consequences of refusing, there was no reason to require administrative or judicial review of the offer-it was just an offer, which the parents would not accept unless they thought it would make them better off to do so.

When the case resumed in the district court, the agency moved for summary judgment on the ground that there was no evidence of misrepresentation. The plaintiffs agreed, so the district judge entered summary judgment, but they appealed anyway and now oppose the defendant's motion for summary affirmance on the ground that the motion is not within any of the categories that *United States v. Fortner,* 455 F.3d 752, 754 (7th Cir.2006), deems appropriate for summary affirmance. They misread *Fortner.* The concern in that case was with an appellee's filing a motion for summary affirmance at the last minute, that is, right before the briefs on the merits were due to be filed. That made needless additional work for the appellant and for the court. There are situations (*Fortner* gives three examples) in which the last-minute filing is proper-suppose a case had just been decided by the Supreme Court

that made affirmance a slam dunk. There would be no purpose in requiring full briefing.

The motion in this case was filed well before the appellant's brief was due, and the plaintiffs have had and taken an opportunity to respond. Remember that they conceded in the district court that they had no evidence that would satisfy the standard we set forth in our previous opinion. They do not retract that concession in their opposition to the motion but (besides expressing disagreement with our opinion without presenting any new argument) contend merely that some of the class members "lack education" or have "low intelligence." The class, however, is not limited to the uneducated or the unintelligent, and a plaintiff obviously cannot obtain class-wide relief for harms suffered by only some of its members. *General Telephone Co. v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Oshana v. Coca-Cola Co.,* 472 F.3d 506, 513-14 (7th Cir.2006).

The district judge's order that this appeal unavailingly challenges was one of several orders that she issued in an attempt to resolve three separate sets of claims pressed in this litigation; and it may provide helpful guidance to the district court to note our concern with the third order, which purports to retain jurisdiction of a terminated case. The three sets of claims are as follows: "Dupuy I" as we'll call it sought special procedures for child-care workers accused of abuse or neglect. Dupuy II complained that the safety plans had been coerced, and it is that set of claims that was before us in the prior appeal and is before us in this appeal. Dupuy III sought additional procedures for accused child-care workers.

The district judge first entered an order which stated that the Dupuy I and III claims were

dismissed without prejudice, but in the next paragraph she stated that they "shall be dismissed with prejudice in accordance with the terms of the stipulation," that is, a settlement of those claims. It is apparent that she intended to dismiss with prejudice only the claims of the named plaintiffs, because they were the only parties to the settlement. Three days later, however, having meanwhile granted summary judgment on the Dupuy II claims, she entered a "termination order" stating that the entire case was "dismissed with prejudice." That order wiped out the claims of the unnamed class members, apparently inadvertently, since they had not been parties to the settlement. The plaintiffs moved the judge to vacate the order, and she did, thus restoring the order that had dismissed the unnamed class members' Dupuy I and III claims without prejudice. She added that with respect to the named class members' Dupuy I and III claims she was "retain[ing] jurisdiction as provided in the Parties' stipulation." In the stipulation, the plaintiffs had expressly released the defendant from all claims "which arose or could have been raised" in the suit; that was a general release. *Fair v. International Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1116 (7th Cir.1990).

The district judge's attempted retention of jurisdiction to enforce the stipulation is the troublesome part of the last order. In *Lynch, Inc. v. SamataMason, Inc.*, 279 F.3d 487, 489-90 (7th Cir.2002), and *Shapo v. Engle*, 463 F.3d 641, 643 (7th Cir.2006), we ruled, in reliance on *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), that when a suit is dismissed with prejudice, it is gone, and the district court cannot adjudicate disputes arising out of the settlement that led to the dismissal merely by stating that it is retaining jurisdiction. See also *Blue Cross & Blue Shield Ass'n v. American Express*

*Co.*, 467 F.3d 634, 636 (7th Cir.2006). Other cases, discussed in Morton Denlow, "Federal Jurisdiction in the Enforcement of Settlement Agreements: *Kokkonen*Revisited," 2003 *Fed. Cts. L.Rev.* 2 (2003); Denlow, "What Is an Attorney to Do? Ensuring Federal Jurisdiction Over Settlement Agreements in Light of Recent Seventh Circuit Cases,"*The Circuit Rider: The Journal of the Seventh Circuit Bar Association,* May 2007, p. 24, assume that combining dismissal with prejudice with retention of jurisdiction to enforce the settlement is a permissible method of retaining authority to decide disputes arising from the settlement. The principal argument that Magistrate Judge Denlow makes for that procedure is that a defendant is unlikely to settle a case unless the case is dismissed with prejudice, as otherwise the defendant would be exposed to a repeat suit by the plaintiff, and therefore settlements that the district court is empowered to enforce will be discouraged. The obvious alternative, however, as suggested in *Shapo v. Engle, supra,* 463 F.3d at 646, is for the court to dismiss without prejudice but the parties to include in the settlement a release of the defendant (as was done here, making dismissal with prejudice redundant). That has the same effect as enabling a dismissal to be pleaded in a subsequent suit as res judicata, but avoids the paradox of dismissing a case with finality yet at the same time retaining it.

Magistrate Judge Denlow expresses concern that a release does not give a defendant as much security against further suit as a dismissal with prejudice, which allows the dismissal to be pleaded as res judicata. But both accord and satisfaction (the formal legal name of a release) and res judicata are affirmative defenses to a subsequent suit, and if the district court, by having dismissed without prejudice, retains the power to enforce the settlement, it can enforce the release (a term of the settlement)

directly, without putting the defendant to the trouble of having to plead release as a defense in a renewed suit. It is true that dismissal without prejudice, because it merely allows the suit to be refiled, will allow adjudication of issues relating to the settlement only if the refiled suit is timely; and when a suit is dismissed without prejudice, the statute of limitations continues to run from the date (normally the date of the injury) on which the claim accrued. E.g., *Coleman v. Milwaukee Board of School Directors,* 290 F.3d 932, 934 (7th Cir.2002); *United States v. Carlone,* 666 F.2d 1112, 1113-14 (7th Cir.1981). But the statute of limitations is just another affirmative defense, which the parties can waive in the settlement if they want the district court to be able to adjudicate disputes after the limitations period has run. Alternatively, they can elide any issue of untimeliness by embodying the settlement in a consent decree.

AFFIRMED.

United States Court of Appeals,Seventh Circuit.
Belinda DUPUY, et al., Plaintiffs-Appellants,

v.

Bryan SAMUELS, Director, Illinois Department of Children and Family Services, Defendant-Appellee.
**No. 06-1027.**

Argued Sept. 20, 2006.
Decided Oct. 3, 2006[1].

Jack L. Block, Sachnoff & Weaver, Chicago, IL, Robert E. Lehrer (argued), Lehrer & Podleaf, Chicago, IL, for Plaintiffs-Appellants.

Barbara L. Greenspan (argued), Erik G. Light, Office of the Attorney General, Chicago, IL, for Defendant-Appellee.

Before POSNER, EASTERBROOK, and EVANS, Circuit Judges.

POSNER, Circuit Judge.

This class action suit by parents, now in its tenth year, challenges a range of practices by Illinois' child-welfare agency claimed to infringe parental rights that are protected by the due process clause of the Fourteenth Amendment; for background, see *Dupuy v. Samuels,* 397 F.3d 493 (7th Cir.2005). The present appeal is from a preliminary injunction that the plaintiffs, who are the appellants, contend does not go far enough; the defendants have not cross-appealed. The plaintiffs are also attempting to appeal from the judge's class certification order, which they contend defined the plaintiff class too

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[1] This opinion will be published, but is being released in typescript.

narrowly. But their time to appeal from that order has long expired. Fed.R.Civ.P. 23(f).

The injunction of which the plaintiffs complain violates Rule 65(d) of the civil rules (though that is not the plaintiffs' complaint about it), which requires that an injunction be a self-contained document rather than incorporate by reference materials in other documents. The purpose is to minimize disputes over what has been enjoined. *Schmidt v. Lessard,* 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974) (per curiam); *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 74-76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967); *D. Patrick, Inc. v. Ford Motor Co.,* 8 F.3d 455, 461 (7th Cir.1993); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2955 (2d ed.1995); 13 *Moore's Federal Practice* § 65.60, pp. 475-77 (13th ed.2006). The Ninth Circuit allows incorporation by reference if the material thus incorporated is physically attached, as by stapling, to the injunction order. *Reno Air Racing Ass'n, Inc. v. McCord,* 452 F.3d 1126, 1132-33 (9th Cir.2006); *California v. Campbell,* 138 F.3d 772, 783 (9th Cir.1998). There is no reason to complicate the administration of the rule by such an interpretation. There are times when literal interpretation is best; this is one of them. The Ninth Circuit's approach would encourage just the kind of mistake that the rule aims to prevent-the thoughtless attachment of separately composed documents when if the judge had integrated their contents into the injunction order he might have realized that they would not cohere with the rest of the order without changes.

Rule 65(d) is simple, clear, sensible, easily complied with, and not even new; we are distressed by the failure of the parties and the district judge to have complied with it in this case-a case that underscores the good sense of the rule. What the

parties and the district judge understand to be the injunction begins with an opinion by the judge in which she says that "the court approves the DCFS proposal, with certain modifications, outlined below," and the "outline" follows. If the "certain modifications" were literally an "outline," there would be no injunction but merely the sketch of one. But it is apparent that the word "outlined" was used imprecisely; and likewise that when the court, as one of its modifications, said vaguely that "the court *would* add a statement to this effect..." (emphasis added), it meant that the language that followed was part of the injunction. Yet one of the "modifications" modifies nothing; it says merely that "the court *recommends* that the plan provide" etc.-and a recommendation cannot be an injunction.

Both sides are complicit in the violation of Rule 65(d), having expressed no concern with the form of the injunction. But the appellants in addition violated 7th Cir. R. 30(d), which requires certification that the appendix contain all materials required by Rule 30(a) to be included in the appendix. For among the retired materials are the judgment, and the judgment in this case includes not only the judge's order modifying the defendant's proposed injunction, *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n,* 908 F.2d 144, 149-50 (7th Cir.1990), but also those portions of that proposed injunction that the judge (improperly) incorporated by reference. They do not appear in the appellants' appendix but instead are deeply buried in the record; the lawyers could not find them when asked for them at argument.

So Rule 65(d) was flouted. But a violation of the rule does not deprive the appellate court of jurisdiction to review the injunction (e.g., *Combs v. Ryan's Coal Co.,* 785 F.2d 970, 978 (11th Cir.1986)) unless as a result of the violation it is so unclear

what the defendant is enjoined from doing that he could not be punished for violating the injunction. For in that event he would lack standing to challenge the injunction because, being unenforceable, it would place no burden on him. He could thumb his nose at it with impunity. *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 646-47 (7th Cir.2002); *Chicago & North Western Transportation Co. v. Railway Labor Executives' Ass'n, supra*, 908 F.2d at 149-50; see also *Bates v. Johnson*, 901 F.2d 1424, 1428 (7th Cir.1990). "[A]n unenforceable order is no order at all." *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., supra*, 299 F.3d at 647.

The power to review an injunction that violates Rule 65(d) extends to any adequately clear materials clearly incorporated into the injunction by reference, as we held in *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 275-76 (7th Cir.1992); cf. *Abbott Laboratories v. Unlimited Beverages, Inc.*, 218 F.3d 1238, 1241-42 (11th Cir.2000). And that is this case. The core of the injunction is clear enough to be enforceable; it requires the defendant to provide informal administrative review of "safety plans."

There is tension between the holding in *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., supra*, and *D. Patrick, Inc. v. Ford Motor Co., supra*, which states that an injunction that incorporates materials by reference cannot be enforced, though the court went on to find that in any event the incorporated material-a settlement agreement-was ambiguous. 8 F.3d at 461-62. *D. Patrick* did not cite *Great American*, and its flat statement of unenforceability, which is not limited to incorporation by reference but embraces any injunction that violates Rule 65(d), is inconsistent with the decisions holding that a

violation of the rule does not affect the jurisdiction of the reviewing court as long as the obligations that the injunction imposes on the defendant are clear enough that he can be punished should he violate them.

*D. Patrick* justified its unorthodox position by quoting from *H.K. Porter Co. v. National Friction Products Corp.*, 568 F.2d 24, 27 (7th Cir.1977), that "Rule 65(d) is no mere extract from a manual of procedural practice. It is a page from the book of liberty."8 F.3d at 461. Beware decision by metaphor. What the court seems to have meant was that it would be unjust to punish someone for violating an injunction that he could not understand. It would be. But Rule 65(d) is not needed in order to ward off that injustice; if the injunction is not clear, the defendant cannot be punished for violating it, Rule 65(d) or no Rule 65(d). The purpose of the rule is to make sure that violations of injunctions *are* punishable.

The lofty language of *H.K. Porter* is particularly inapt when as in this case it is the plaintiff that is appealing the injunction. For it is then much as if the plaintiff were appealing from the denial of injunctive relief altogether, which would present no problem under Rule 65(d). The difference is that when there *is* an injunction and the plaintiff is seeking additional relief, the need for that relief is likely to depend on what relief the judge has already granted, and to be able to form a precise and concise understanding of that relief may require that the rule have been complied with.

Enough said about the procedural issue. Let us turn to the merits, and explain what a "safety plan" is.

If the State of Illinois (1) "has reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety; and (2) there is not time to apply for a court order...for temporary custody of the child," the state can take the child into "temporary protective custody" without additional process, 325 ILCS 5/5, but there is a right to a judicial hearing within 48 hours. 705 ILCS 405/1-3, -5, 405/2-9(1), (3); *In re John Paul J.*, 343 Ill.App.3d 865, 278 Ill.Dec. 904, 799 N.E.2d 769, 776 (Ill.App.2003). Other states have similar laws, though often they require "reasonable cause" or "probable cause" rather than "reason to believe," Alyson Oswald, "Comment, They Took My Child! An Examination of the Circuit Split Over Emergency Removal of Children From Parental Custody," 53 *Cath. U.L.Rev.* 1161, 1183 n. 131 (2004), although it is doubtful whether there is any practical difference among these formulas, any one of which should satisfy the due process clause of the Fourteenth Amendment. See, e.g., *Berman v. Young*, 291 F.3d 976, 983-84 (7th Cir.2002); *Brokaw v. Mercer County*, 235 F.3d 1000, 1010-11 (7th Cir.2000); *Doe v. Kearney*, 329 F.3d 1286, 1294-95 (11th Cir.2003); *Croft v. Westmoreland County Children & Health Services*, 103 F.3d 1123, 1126-27 (3d Cir.1997). Among the liberties protected by that clause is the right of parents to the custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). But "when a child's safety is threatened, that is justification enough for action first and hearing afterward." *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir.1983); see also *Duchesne v. Sugarman*, 566 F.2d 817, 825-26 (2d Cir.1977).

But sometimes, in lieu of immediately removing the child from its parents, the state will offer the parents the option of agreeing to a "safety plan," under which restrictions short of removal are imposed pending completion of the state's investigation into abuse or neglect. The plan might require that one of the parents leave the house where the child is living, or that he keep out of the child's presence unless a designated family member is present as well, or that the child be sent to live with other family members. Although these curtailments of parental rights are less extreme than removing the child from parental custody altogether and sticking him in foster care, they may be invasive enough to count as deprivations of liberty, thus triggering the right to a hearing. The difference from the standpoint of parental rights between removing the parent from the child's home and removing the child from the home is not negligible, because in the first case the child remains in his accustomed residence and often with one of his parents. But it is not great enough to justify concluding that there is no invasion of parental liberty in the first case, *Croft v. Westmoreland County Children & Youth Services, supra,* 103 F.3d at 1125-27, although the amount of process that is constitutionally required may be less since the deprivation is less. See *Gottlieb v. County of Orange,* 84 F.3d 511, 522 (2d Cir.1996).

Critically, however, the decision to agree to a safety plan is optional with the parents. If they think that if they turn down the plan the state will not try to remove the child from their custody, or that if it does they will prevail in the prompt judicial hearing to which they are entitled on the propriety of the removal, they will reject the plan. The plan is thus a form of interim settlement agreement pending the outcome of the investigation, as when a plaintiff in a suit for restitution agrees not to move for

immediate seizure of assets held by the defendant if the latter agrees to place them in judicial custody. It is not surprising that the safety-plan program is not embodied in a statute or formal regulation, but merely in internal directives of the Department of Children and Family Services. It imposes no obligation on anybody.

Which answers the plaintiffs' argument that the Constitution entitles parents to a hearing before they are offered the option of agreeing to such a plan. There is no right to a hearing when no substantive right has been infringed or is threatened with being infringed. The state does not force a safety plan on the parents; it merely offers it. Parents are entitled to a hearing if their parental rights are impaired, but the offer of a settlement no more impairs those rights than a prosecutor's offer to accept a guilty plea impairs the defendant's right to trial by jury.

It is true that by refusing to agree to a safety plan, as by refusing to plead guilty, a person may find himself in a worse pickle than if he had accepted it. The plan might be for the child's father to move out of the house for a week. If he refused, the state might decide to place the child in foster care, and though if it did so the father could demand a judicial hearing, the judge's ruling might go against him. That is a dilemma implicit in any settlement process. If there weren't a downside to refusing to settle, there would be no settlements.

Of course should the state violate the terms of the safety plan and by doing so curtail parental rights beyond what the parents had agreed to, they would be entitled by the Constitution to a prompt hearing. But that is not the complaint.

The plaintiffs are very wroth because, they say, the state sometimes offers a safety plan on the basis

of "mere suspicion" of child abuse or neglect, rather than probable cause or at least reasonable suspicion. But as mere suspicion-some inarticulable hunch-is not a statutory ground for actually removing a child from his parents' custody (Illinois law requires, as we know, that the state have reason to believe that the child is in imminent danger), the parents in such a case have only to thumb their nose at the offer and the agency can do nothing but continue its investigation, which it would do anyway. The plaintiffs complain that the prospect of a hearing if the state removes a child is not adequate because the hearing will not address the details of the safety plan; it will deal exclusively with the validity of the child's removal from the home and therefore, the plaintiffs insist, is inadequate. The argument is silly; a plaintiff might as well say that a tort suit can't be settled without a hearing on the validity of the settlement. Because the safety plan is voluntary, no hearing of any kind is necessary; hearings are required for deprivations ordered over objection, not for steps authorized by consent.

It adds nothing to say as the plaintiffs do that they did not *really* consent-that the state "coerces" agreement to safety plans by threatening to remove the child from his parents' custody unless they agree to the plan. It is not a forbidden means of "coercing" a settlement to threaten merely to enforce one's legal rights. If you sue and before judgment settle because the defendant is willing to settle on more favorable terms than you expect to obtain from pressing the suit to judgment, you've obtained a favorable settlement on the basis of an implicit threat to litigate to an outcome that would make the defendant worse off than if he settled; but you have not infringed any right of his. Coercion is objectionable-and when objectionable is more aptly described as duress or extortion-when illegal means are used to obtain a benefit.

There is no evidence of that. The consent form that the state gives parents requires them if they consent to state in writing that they "understand that failure to agree to the [safety] plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home." This just notifies the parents of the lawful measures that may ensue from their failure to agree to a plan or, if they agreed to it, from their violating the plan. There is no suggestion that the agency offers a safety plan when it has no suspicion at all of neglect or abuse, and even in that case the ordinary prerequisite to a finding of duress-that the person have no effective legal remedy against the threat, *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 390 (7th Cir.2002); *Oxxford Clothes XX, Inc. v. Expeditors Int'l, Inc.*, 127 F.3d 574, 579 (7th Cir.1997); *Abbadessa v. Moore Business Forms, Inc.*, 987 F.2d 18, 22-23 (1st Cir.1993)-would be missing, since if a child is actually taken, the parents have a very prompt legal remedy. If the agency has even a bare suspicion, this may ripen in the course of the investigation into cause to obtain a court order of removal, and this possibility is all that the consent form should and does warn the parents of.

We can't see how parents are made worse off by being given the option of accepting the offer of a safety plan. It is rare to be disadvantaged by having more rather than fewer options. If you tell a guest that you will mix him either a Martini or a Manhattan, how is he worse off than if you tell him you'll mix him a Martini? And yet the belief that giving people more options makes them worse off is common, especially in cases involving guilty pleas, as in our recent case of *United States v. Spilmon*, 454 F.3d 657 (7th Cir.2006). The defendant agreed to plead guilty and receive a 57-month sentence. As

part of the plea agreement the government dismissed charges against his wife. The defendant moved to set aside the guilty plea on the ground that he had been coerced to plead guilty by the realization that otherwise his wife would be prosecuted. We affirmed the denial of the motion. We said "it would be in no one's interest if a defendant could not negotiate for leniency for another person. From the defendant's standpoint the purpose of pleading guilty is precisely to obtain a more lenient outcome than he could expect if he went to trial." *Id.* at 658. In words equally applicable to this case, we added that "suppose Spilmon were innocent, and *knowing this* but wanting to convict him the government told him that unless he pleaded guilty it would prosecute his wife-whom it also knew to be innocent. The couple could of course reject the package deal, hoping to be acquitted (being by hypothesis innocent), but given the inherent uncertainties of the trial process they might be afraid to do so, and the result would be a plea of guilty that resulted in the conviction of an innocent person (the husband). That would be a case of duress-that is, of pressure exerted to obtain a result to which the party applying the pressure had no right-and likewise if the government threatened to prosecute the defendant's wife knowing that she was innocent. But it is not duress to offer someone a benefit you have every right to refuse to confer, in exchange for suitable consideration." *Id.* at 658-59 (emphasis added; citations omitted). To the same effect, see *United States v. Miller*, 450 F.3d 270, 272-73 (7th Cir.2006).

The fact that the safety-plan option is a boon to parents may explain why, though similar options are offered by other states, see, e.g., *In re T.A.*, 279 Ga.App. 377, 631 S.E.2d 399, 400 (Ga.App.2006); *In re M.G.T.-B*, 629 S.E.2d 916, 917-19 (N.C.App.2006), lawsuits challenging them have been rare-indeed this is the first we've found. A safety plan seems a

sensible, perhaps indeed an unavoidable, partial solution to the agonizingly difficult problem of balancing the right of parents to the custody and control of their children with the children's right to be protected against abuse and neglect.

The plaintiffs point us to *Doe v. Heck*, 327 F.3d 492, 524-25 (7th Cir.2003), which held, as far as bears on this case, that a state agency violated the Constitution by threatening parents with removing their child from their custody if they did not have their attorney call the agency within 24 hours. But it was a threat the agency had no right to make. It did not suspect the parents of child abuse. The child had been spanked at school, and the agency was investigating the school and wanted to interview the child and the parents were not cooperating. The agency had a right to interview the child, but there are procedures for compelling such an interview, and threatening the parents with the loss of their parental rights was not among the authorized procedures. The case nicely illustrates the line between a lawful threat and duress.

*Croft v. Westmoreland County Children & Youth Services, supra,* another case on which the plaintiffs place heavy weight, is closer to the present case, but still distinguishable. The defendant's case worker, suspecting that a father was abusing his child but having no objective basis for the suspicion, gave the father an "ultimatum" that if he didn't leave the family home immediately, the agency would place the child in foster care. The court held the threat improper on the ground that the case worker did not have adequate grounds for removing the child from the parents' custody even temporarily. The threat was not grounded in proper legal authority. The coercion about which the plaintiffs complain in this case does not include such ultimata; the consent form informs the parents of the *possibility* that the

child will be removed-information that is in the nature of a truism.

The trial of the merits of the plaintiffs' challenge to the administration of the safety plans is scheduled to begin on October 16. Maybe they'll be able to prove that the state really does coerce agreement to its safety plans wrongfully by misrepresentations or other improper means. They have not done so yet. On the record compiled so far, the plaintiffs are entitled to no relief at all. It is only the state's decision not to file a cross appeal that prevents us from reversing the grant of the preliminary injunction, and that instead requires that the injunction be

AFFIRMED.

United States District Court,
N.D. Illinois,
Eastern Division.

Belinda DUPUY, et al, Plaintiffs,

v.

Bryan SAMUELS, Director, Illinois Department of Children & Family Services, in his official capacity, Defendant.
**No. 97 C 4199.**

March 9, 2007.

**DOCKET ENTRY TEXT**

PALLMEYER, District Judge.

Motion to vacate February 26 Dismissal Order (967) is granted. With the final resolution of the three claims asserted in this case (referred to as *Dupuy I*, *Dupuy II*, and *Dupuy III*), and final judgment having been entered, all pending motions are stricken as moot. This case is terminated, but the court retains jurisdiction as provided by the parties' Stipulation.

Docketing to mail notices.

Courtroom Deputy Initials: ETV

United States District Court,
N.D. Illinois,
Eastern Division.

Belinda DUPUY, et al, Plaintiffs,

v.

Bryan SAMUELS, Director, Illinois Department of Children & Family Services, in his official capacity, Defendant.
**No. 97 C 4199.**

February 26, 2007.

## ORDER

PALLMEYER, District Judge.

On December 7, 2005, this court entered an order directing Defendant, the Director of the Illinois Department of Children and Family Services, to make certain changes in its practices for imposing "safety plans" on families of children who were the subject of reports of abuse or neglect. Plaintiffs were unsatisfied by the scope of the relief the court had ordered and appealed the December 7, 2005 ruling to the Seventh Circuit Court of Appeals. Defendant did not cross-appeal.

The Seventh Circuit technically affirmed this court's ruling, but its October 3, 2006 opinion made clear that it did so only because there was no cross-appeal. *Dupuy v. Samuels*, 465 F.3d 757, 763 (7th Cir. 2006). In short, the Seventh Circuit disagreed with this court's conclusions that safety plans were imposed in some instances without the voluntary agreement of affected class members and that some mechanism for review of those

plans was therefore appropriate. In the Seventh Circuit's view, "[o]n the record compiled so far [before this court], the plaintiffs are entitled to no relief at all." 465 F.3d at 763. The Seventh Circuit's opinion left open the possibility that, on remand, Plaintiffs might succeed in proving "that the state really does coerce agreement to its safety plans wrongfully by misrepresentations or other improper means." *Id.*

Taking his cue, Defendant moved the court to dissolve any injunctive relief related to the *Dupuy II* claims and now seeks summary judgment in his favor on those claims. In an affidavit in support of Defendant's motion, Beth Solomon, Senior Litigation Counsel for DCFS, asserts that it is not DCFS's policy or practice to use misrepresentations or improper conduct to impose safety plans and that there is no evidence such methods were used with respect to any of Plaintiffs' witnesses. For their part, Plaintiffs contend that the Court of Appeals erred in holding that safety plans are voluntary as a matter of law; erred in failing to adopt this court's findings of fact; erred in failing to address Plaintiffs' argument that class members' agreement to safety plans are not "knowing and intelligent"; and mischaracterized Plaintiffs' claims concerning the evidence necessary for DCFS to propose a safety plan at all. Plaintiffs nevertheless recognize that this court is "bound to follow the court of appeals' mandate" and therefore "constrained to grant the defendant's motion." (Plaintiffs' Memorandum in Response to Defendant's Motion for Summary Judgment as to the Dupuy II Claims, at 5, 6, 8, 25.) Plaintiffs acknowledge, further, that they do not have evidence that DCFS policies and practices resulted in "systemic and knowing 'misrepresentations' of fact or law" when investigators impose safety plans. *(Id.* at 6 n. 2.)

## CONCLUSION

Although they disagree with the Court of Appeals' assessment of the record and its conclusions of law, Plaintiffs acknowledge that this court is bound by those conclusions. Defendant's motion (905) is granted. Plaintiffs' *Dupuy II* claims are dismissed with prejudice.

ENTERED:

Dated: February 26, 2007

/s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States District Judge

United States District Court,
N.D. Illinois,
Eastern Division.

Belinda DUPUY, et al, Plaintiffs,

v.

Bryan SAMUELS, Director, Illinois Department of Children & Family Services, in his official capacity, Defendant.
**No. 97 C 4199.**

December 2, 2005.

## ORDER

PALLMEYER, District Judge.

On March 9, 2005, this court entered a Memorandum Opinion and Order addressing Plaintiffs' concerns regarding "safety plans" which impose restrictions on families during the pendency of investigations into allegations of abuse or neglect. *See Dupuy v. Samuels*, No. 97 C 4199, 2005 WL 588997 (N. D. Ill. Mar. 9, 2005). The court concluded, for the reasons explained in that opinion, that safety plans that are more than brief or temporary effect a constitutional deprivation when they are combined with an express or implied threat that failure to comply will result in the Department of Children and Family Service's taking protective custody of children. The court declined to enjoin the imposition of safety plans altogether, but concluded that

> Plaintiffs are entitled to some opportunity to review restrictions placed on their contacts with their children. Further, the court notes its belief that

> persons subject to safety plans are entitled to immediate notice of the basis on which the investigator has determined such a plan is necessary, as well as notice of the expected duration of such a plan and an explanation of the process and schedule for seeking review of restrictions imposed by the plan. As for what those procedures should entail, the court, having found a constitutional violation in this case, now defers to DCFS to fashion an appropriate remedy consistent with this opinion.

*Id.* at *35.

The proposal submitted by Defendant in response to the court's order refers to August 13, 2002 amendments to certain DCFS procedures referred to as "Appendix G." It provides for revisions to the safety plan form to identify the factors giving rise to a perceived need for a safety plan, and directs that family members and other persons involved in the plan will be provided with a handwritten copy of the plan at the end of the child welfare specialist's visit. The written plan will include an end date or identify a specific event that must occur before the plan is terminated. In addition, the Department's proposal provides for a procedure referred to as a "Safety Plan Team Assessment," at the request of a family affected by a safety plan, after 28 days. Plaintiffs characterize this proposal as "wholly inadequate," and have drafted their own eight-page Proposed Preliminary Injunction Order, which contemplates a detailed procedure for review of safety plans and for their termination.

This court stands by its determinations that DCFS's past practices with respect to safety plans raise due process and liberty interest concerns. The

court also stands by its conclusion that DCFS is entitled, in the first instance, to propose procedures that will address those concerns. In the court's view, the DCFS proposal is a good-faith attempt to address the issues reviewed in the court's March 9, 2005 opinion. Nor is the court prepared to assume, as Plaintiffs do, that the Safety Plan Team Assessment is nothing more than a "formalized and glorified" version of the Department's "constitutionally worthless" policy. (Plaintiffs' Submission in Accordance with the Court's March 11, 2005 Memorandum Opinion and Order, at 9.)

The court approves the DCFS proposal, with certain modifications, outlined below:

- The DCFS proposal now provides, on page 7 of the Department's May 11, 2005 submission, that "[t]he safety plan will contain a specific duration for the safety plan that will be identified either as a specific time period, or a specific event, i.e., completion of a victim sensitive interview." The court would add a statement to this effect; "If the plan will end with a specific event, the safety plan will explain in writing the steps necessary for that event to occur."

- The DCFS proposal requires the child welfare specialist to "monitor the safety plan every five working days and . . . reassess the safety of the child while monitoring the safety plan." The court would require, further, that the child welfare specialist make a brief notation, at each five-day review, of the reason(s) the safety plan should remain in effect. This requirement, in the court's view,

would serve as a reminder to the child welfare specialist that restrictions are expected to be temporary and limited. The court is concerned that a safety plan not come to be viewed as the "status quo," but does not share Plaintiffs' suspicion that "someone who is responsible for imposing the Safety Plan in the first place" (Plaintiffs' Submission, at 4) will not conscientiously consider whether the necessity for such a plan continues.

- The court endorses the DCFS proposal for a Safety Plan Team Assessment ("SPTA") review mechanism, with certain modifications. In prescribing these modifications, the court reminds the parties that this order regarding safety plan review relates only to those individuals who fall within the amended class definition described in the court's April 16, 2004 order. With respect to such class members, the court concludes that the 28-day waiting period before any review of a safety plan may well violate a family member's privacy or liberty interests. The court believes Plaintiffs' own proposal for review after just five days is unworkable, as well. The court is mindful, too, of the Department's consistent position that most (if not all) safety plans are in fact voluntary and will thus generate no request for review. Given the severity of the restrictions at issue under the amended class definition, the court believes the SPTA review mechanism should be available after ten working days, exclusive of weekends.

- Under the DCFS proposal, the Child Protection Manager convenes the SPTA review. The court recommends that the plan provide that, where practicable, on the request of the class member, a Child Protection Manager who has not been involved in the initial imposition of a safety plan conduct the review.

- Finally, the DCFS proposal calls for the Department to "draft a revised brochure and specific forms to be used during the SPTA process." The court directs, further, that the Department train its staff regarding this process and provide information concerning that process to class members at the time the safety plan is initiated.

With these modifications, the court adopts the Department's proposals as its order. The court directs the Department to implement these new procedures as soon as practicable, and expects that will be no later than 60 days after entry of this order. The court expects, further, to retain jurisdiction to enforce the terms of this order.

ENTER:

Dated: December 2, 2005

/s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States District Judge

United States District Court,
N.D. Illinois,
Eastern Division.

Belinda DUPUY, et al, Plaintiffs,

v.

Bryan SAMUELS, Director, Illinois Department of Children & Family Services, in his official capacity, Defendant.
**No. 97 C 4199.**

March 9, 2005.

## MEMORANDUM OPINION AND ORDER

PALLMEYER, District Judge.

Plaintiffs represent a class of persons who challenge the constitutionality of certain policies and procedures of the Department of Children and Family Services ("DCFS" or the "Department") relating to the investigation of allegations of child abuse or neglect. In an earlier proceeding. Plaintiffs focused on the Department's procedures for determining whether reports of such abuse or neglect should be "indicated" or "unfounded." On March 30, 2001, the court granted Plaintiffs' motion for a preliminary injunction as to certain of these "core" and "special" DCFS policies. Specifically, the court found that "the relatively low standard of proof required to indicate a finding, combined with the indefensible delays" in the appeal process and the resulting "staggering expungement rate" of indicated reports, violated Plaintiffs' procedural due process rights. *Dupuy v. McDonald,* 141 F.Supp.2d 1090, 1136 (N.D.Ill.2001), *aff'd in part and rev'd in part by, Dupuy v. Samuels,* 397 F.3d 493 (7th Cir.2005). The

court noted, further, its suspicion that the agency's lengthy delays not only victimized persons who are innocent of abuse or neglect charges, but might also result in exoneration of persons who are guilty of such charges. 141 F.Supp.2d at 1130.

In this proceeding, Plaintiffs are challenging DCFS "safety plans," which impose restrictions upon families during the pendency of investigations into allegations of abuse or neglect. Plaintiffs claim that the safety plans are unconstitutional and seek further injunctive relief to prohibit DCFS from implementing the plans in any form. Resolution of this issue has been complicated the parties' contentious dispute as to the appropriate class definition. The court has now entered an order defining the class, for purposes of this stage of the litigation, as consisting generally of persons under investigation for child abuse or neglect who are the subject of "safety plans," imposed under threat, that prohibit or restrict their contacts with their children. *See* Order of 9/30/03 (amending class definition to include families subject to safety plans involving no contact requirements or removal from the home); Order of 4/16/04 (amending class definition to require a threat of protective custody and to exclude persons without a legal relationship to the children or spouse). For the reasons set forth below, Plaintiffs' second motion for preliminary injunction is granted in part and denied in part as described herein.

## Background

The background facts, and a description of the DCFS procedures for investigating allegations of abuse and neglect, are more fully presented in this court's March 30, 2001 Memorandum Opinion and Order. *See Dupuy,* 141 F.Supp.2d at 1092-1130. This opinion assumes the reader's familiarity with the

earlier decision and will summarize those facts here only briefly.

## I.

## THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES

DCFS is the state agency charged by statute with the duty of investigating allegations of child abuse and neglect. *Dupuy,* 141 F.Supp.2d at 1092; 325 ILCS 5/2. The Department is organized into various operational divisions, including the Division of Child Protection ("DCP"). The DCP is responsible for operating a hotline to accept calls regarding allegations of child abuse and neglect (the "DCFS Hotline"), and for investigating those allegations. *Id.* at 1093. Of the more than 350,000 calls placed to the Hotline each year, 65,000 are investigated. Approximately 23,000 (or 1/3) of the investigations result in "indicated" findings, meaning that the investigator has determined that credible evidence of child abuse or neglect exists. The remaining charges are deemed "unfounded," meaning that the investigator has not found credible evidence of abuse or neglect. *Id.*

## II.

## THE ABUSE AND NEGLECT INVESTIGATIVE PROCESS

Any person may make a report of child abuse or neglect by calling the toll-free DCFS Hotline. Certain persons whose employment brings them into frequent contact with children are considered "mandated reporters" and, thus, are required by law to make a Hotline report if they have a reasonable belief that a child may be abused or neglected. *Id.* at 1094; (Ill. Admin. Code tit. 89, § 300.30). If a

Hotline call is deemed to be made in good faith and to meet the minimum criteria for further investigation, the Hotline operator completes a Child Abuse and Neglect Tracking System form (the "CANTS 1" form) and submits it to a local DCP office where an investigator is assigned. The investigator is responsible for conducting the investigation and for making a final determination as to whether to "indicate" or "unfound" the report. *Id.* at 1095.

The regulations explain that "[w]hen the investigative worker has completed all required investigative contacts and has secured appropriate physical evidence ... the investigative worker shall make a finding of Indicated or Unfounded. This determination shall be based upon whether the information gathered during the investigation and from the direct observations made by the investigative worker constitutes credible evidence of child abuse or neglect." (Ill. Admin. Code tit. 89, § 300.110(i)). An investigator's recommended determination is reviewed by his or her supervisor who has the actual authority to "indicate" or "unfound" the investigation. *Dupuy,* 141 F.Supp.2d at 1097. Once the recommended finding has been approved, the investigator completes a CANTS 2 Final Finding Report form and forwards it to the State Central Register ("SCR"), where it is registered in a computerized listing of information regarding allegations of abuse or neglect. *Id.* at 1093, 1098. DCFS regulations require that an investigation be completed within 60 days, though this time period may be extended for periods of up to 30 days upon a showing of good cause. (Ill. Admin. Code tit. 89, § 300.110(i)(3)(C)). Evidence at the first preliminary injunction established, however, that in actual practice, investigations often took far longer. *See Dupuy,* 141 F.Supp.2d at 1106-1130.

## III.

## SAFETY PLANS

In conjunction with investigations into child abuse and neglect, DCFS utilizes a variety of plans aimed at protecting children pending the outcome of an investigation and/or after a report has been indicated. One such plan is the Child Endangerment Risk Assessment Protocol ("CERAP") "safety plan." CERAP was developed in response to several high profile incidents in the early 1990s where children were seriously injured or killed shortly after DCFS became involved in their cases. (Tr. 2243-44.) In 1994, the Illinois legislature enacted Public Act 88-614, which required DCFS to develop and implement:

> (1) A standardized child endangerment risk assessment protocol.
>
> (2) Related training procedures.
>
> (3) A standardized method for demonstration of proficiency in application of the protocol.
>
> (4) An evaluation of the reliability and validity of the protocol.

20 ILCS 505/21(e). In response to this legislation, DCFS formed a multidisciplinary committee of external experts to oversee the development of the CERAP process, which is now set forth in Appendix G to Department Rule and Procedure 300, and in the Safety Determination Form, the Safety Plan form, and the Safety Plan Termination Agreement. (*See* Jt. Ex. 7, Appendix G; Jt. Ex. 5(c), CFS 1441-A; Jt. Ex. 5(e), CFS 1441; Jt. Ex. 5(f), CFS 1441-B).

## A. The Safety Plan Assessment Process

The CERAP process is designed to "provide workers with a mechanism for quickly assessing the potential for moderate to severe harm immediately or in the near future and for taking quick action to protect children." (Jt. Ex. 7, Appendix G, at 1.) A CERAP form must be completed for all children in the home of an alleged perpetrator within 48 hours of DCFS's receipt of a Hotline call, and within 24 hours after a child protection specialist sees the alleged child victim(s). (*Id.* at 3; Jt. Ex. 2, Procedures, § 300.50(c).) The CERAP process requires the child protection specialist to assess whether a child is safe or unsafe, using a four-step analysis: (1) does the case present any one or more of 15 enumerated "safety factors"; (2) how does that factor relate to specific individuals; (3) are there any "family strengths and mitigating circumstances"; and (4) would the child be "safe" or "unsafe" absent implementation of a safety plan. (Jt. Ex. 7, Appendix G, at 7-15.)

### 1. The 15 Enumerated Safety Factors

The first step in the CERAP process is for the child protection specialist to determine whether one of 15 enumerated safety factors is present. The factors include: a household member's behavior is violent and out of control; the caretaker has not, will not, or is unable to provide sufficient supervision to protect the child from harm; the child is fearful of people living in or frequenting the home; child sexual abuse is suspected and circumstances suggest that the child's safety may be an immediate concern; and a paramour is the alleged or indicated perpetrator of physical abuse. There is also a general "other" category to cover safety concerns not expressly

listed.[1] The Regulations provide several examples of factors that may fall under the "other" category,

---

[1] The complete list of factors is as follows:
1. Any member of the household's behavior is violent and out of control.
2. Any member of the household describes or acts toward child in predominantly negative terms or has extremely unrealistic expectations. 3. There is reasonable cause to suspect that a member of the household caused moderate to severe harm or has made a plausible threat of moderate to severe harm to the child.
4. There is reason to believe that the family is about to flee or refuse access to the child, and/or the child's whereabouts cannot be ascertained.
5. Caretaker has not, will not, or is unable to provide sufficient supervision to protect child from potentially moderate to severe harm.
6. Caretaker has not, or is unable to meet the child's medical care needs that may result in moderate to severe health care problems if left unattended.
7. Any member of the household has previously or may have previously abused or neglected a child, and the severity of the maltreatment, or the caretaker's or other adult's response to the prior incident, suggests that child safety may be an urgent and immediate concern.
8. Child is fearful of people living in or frequenting the home.
9. Caretaker has not, or is unable to meet the child's immediate needs for food, clothing, and/or shelter; the child's physical living conditions are hazardous and may cause moderate to severe harm.
10. Child sexual abuse is suspected and circumstances suggest that the child['s] safety may be an immediate concern.
11. Any member of the household's alleged or observed drug or alcohol abuse may seriously affect his/her ability to supervise, protect, or care for the child.
12. Any member of the household's alleged or observed physical/mental illness or developmental disability may seriously affect his/her ability to supervise, protect or care for the child.
13. The presence of domestic violence which affects caretaker's ability to care for and/or protect child from imminent, moderate to severe harm.
14. A paramour is the alleged or indicated perpetrator of physical abuse.
15. Other (specify).
(Jt.Ex. 5(e), CFS 1441.)

including that a child's behavior is likely to provoke the caretaker to harm the child; that persons in the household have unexplained injuries; or that the caretaker refuses to cooperate or is evasive. (Jt.Ex. 5(e), CFS 1441; Jt. Ex. 7, Appendix G, at 12.) If the investigator determines that there is "clear evidence or other cause for concern" that a factor is present, he must check the factor "yes" on the CERAP Safety Determination Form (CFS 1441); otherwise, he must check the factor "no." (*Id.*)

DCFS Procedures do not define what constitutes "other cause for concern." John Goad, former Deputy Director of the Department's Division of Child Protection, testified that the investigator is expected to look for "a reasonably extreme version" of a listed safety factor, and must determine a factor's existence using all of the information available from the initial report and the person who made it, as well as any additional information that may be obtained by observing and talking with the children and the family, and by observing the home environment. (Tr. 2259, 2263-64.) It appears that in practice, however, investigators do not always require a "reasonably extreme" showing and that any amount of evidence may be sufficient warrant for the investigator to check a safety factor "yes." Deputy Director Goad conceded, for example, that investigators need neither a certain "level of evidence" nor evidence confirming that it is "more likely than not" that a safety factor is present in order to check a factor "yes." (PX L, Goad Dep., at 27-28.)

Plaintiffs find this low standard significant, particularly because several factors by their terms require only allegations of wrongdoing and/or minimal evidence of any risk of harm to the child. Factors 11, 12, and 14, for example, direct investigators to check "yes" based solely on an allegation of abuse or neglect, even if no

investigation has yet occurred or if an investigation suggests that the allegation may be untrue. (*See, e.g.*, Jt. Ex. 5(e), CFS 1441, factor 14) ("[a] paramour is the *alleged* or indicated perpetrator of physical abuse") (emphasis added); Tr. 200-01. Factors 2, 8, and 14 direct investigators to check "yes" even if there is no or only nominal evidence that the presence of the factor poses any danger of harm to a child. (*See, e.g., id.*, factor 8) ("[c]hild is fearful of people living in or frequenting the home"; no requirement of evidence that the child be in actual danger from those people). In addition, nine of the factors (1, 2, 3, 7, 8, 10, 11, 12, and 14) do not require any evidence that a parent or caretaker (as opposed to some other "member of the household") has engaged in any wrongful conduct. Factor 3, for example, states that "[t]here is reasonable cause to suspect that a member of the household caused moderate to severe harm or has made a plausible threat of moderate to severe harm to the child." (Jt.Ex. 5(e), CFS 1441.) This test is met, presumably, even where there is no evidence that the parent or caretaker is unable to ensure the safety and supervision of his or her children.

For each factor checked "yes," the investigator is expected to explain what led to that determination. (Jt. Ex. 7, Appendix G, at 12; Tr. 2265-66.) DCFS Procedures explain, further, that "[t]he presence of any one of the listed behaviors and/or injuries does not in and of itself mean that a child should be determined to be unsafe." (*Id.* at 8.) Rather, an investigator must also consider (1) the age and developmental status of the child; (2) the mental, medical, and/or developmental status of the parent(s) or other person(s) responsible for the child's safety (i.e., are they capable of and willing to protect the child's safety?); (3) the type, severity, location, and/or extent of injury to a child; and (4) the intent,

severity and/or duration of the behaviors directed toward the child. (*Id.*)

If an investigator does not check any safety factors "yes," the CERAP process is completed without the need for further action. If, on the other hand, the investigator determines that any one of the 15 safety factors is present and checks that box "yes," then he or she must proceed to the next step of the process.

**2. Family Strengths and Mitigating Circumstances**

At the next step of the CERAP process, the investigator is required to "describe any family strengths or mitigating circumstances which may serve to manage or control the safety factors." (Jt. Ex. 7, Appendix G, at 13.) DCFS Procedures recognize that "[s]ometimes the presence of a safety factor can be partially or fully controlled or eliminated by a family strength or mitigating circumstance." (*Id.*) According to Appendix G, "[r]egular contact with a support person who can assure the safety of the child" is one example of such a family strength or mitigating circumstance. (*Id.*) Deputy Director Goad offered the additional example of a husband's "credibl[e]" assurance that he will remove from the home a "violent and out of control" mother who is "physically small" until she "calm[s] down." (Goad Dep., at 55-56.) DCFS Procedures do not otherwise provide any guidance for determining either the presence of relevant family strengths or mitigating circumstances, or the proper method of balancing them against the cited safety factor(s).

The August 13, 2002 amendments to Appendix G provide that "[f]or the purpose of safety assessment, a protective effort must be made on the family's initiative and not as the result of the worker's suggestion in order for it to constitute mitigation."

(Jt. Ex. 7, Appendix G, at 13.) By way of example, the amendments state that in a domestic violence situation, "if the worker initiates the mother's move to [a] shelter, it is the worker's and not the mother's capacity that has controlled the safety threat [so] the child is considered unsafe and the move to the shelter is considered a safety plan." (*Id.*) *See infra* pp. 10-20 for a discussion of safety plans. In other words, a protective measure will not constitute a mitigating circumstance unless the caretaker proposes it without any prompting from a DCFS representative.

Deputy Director Goad testified that there are "probably" potential mitigating factors as to every safety factor, but of the documentation supporting imposition of a safety plan in the 92 sample cases in this litigation, 64 (or 69%) did not identify any family strengths or mitigating circumstances. (Goad Dep., at 56-57; Tr. 2667.)

### 3. The "Safe" or "Unsafe" Determination

If an investigator determines that a safety factor is present but controlled by a family strength or mitigating circumstance, the child must be deemed "safe," meaning that "[t]here are no children likely to be in immediate danger of moderate to severe harm at this time" and no safety plan is necessary. (Jt.Ex. 5(e), CFS 1441.) If, however, the investigator determines that a safety factor is not controlled by a family strength or mitigating circumstance, the child must be deemed "unsafe," meaning that "[a] safety plan must be developed and implemented or one or more children must be removed from the home because without the plan they are likely to be in immediate danger of moderate to severe harm." (Jt.Ex. 5(e), CFS 1441) (emphasis in original). As noted, a determination of "unsafe" may be made based on the presence of only one safety factor, some

of which require no or only nominal evidence that a child is in danger of harm. In addition, because investigators must complete the CERAP analysis for all children in the home of an alleged perpetrator, children who are not alleged victims of abuse or neglect are nonetheless commonly subject to safety plans. (Jt. Ex. 7, Appendix G, at 5.)

## B. Creation of Safety Plans

Once an investigator finds that a child is "unsafe," the next step is to develop a "safety plan." Deputy Director Goad estimated that as many as 10% of investigations result in safety plans, which translates into as many as 10,000 plans per year. (Tr. 2300-01.) Safety plans are intended to be collaborative efforts between the investigator and the family. According to Deputy Director Goad, the investigator generally talks to the family about the problem that led to the "unsafe" determination and asks family members to suggest possible steps for assuring the safety of the child. (Tr. 2302.) Goad explained that the investigator is then expected to discuss the family's ideas for a safety plan in an effort to work out mutually-agreeable terms. (Tr. 2302-03.) The evidence offered by Plaintiffs suggests, however, that in practice, investigators often make little effort to collaborate with families in implementing safety plans. Nearly every class member witness who signed a safety plan testified that the investigator simply presented a proposed plan for his/her signature with little or no discussion of the plan terms or alternatives. (Tr. 346, 470-71, 556, 562, 715, 719, 795-98, 1165-66, 1304, 1379.)

### 1. Plan Terms

An effective safety plan includes measures designed to control the safety factors that led to the need for a safety plan; is as minimally disruptive to the family

as possible; minimizes any separation issues for family members; and relies on resources that are "immediately and realistically available" to the family. (Tr. 2283 (Goad).) The safety plan must be recorded on the Safety Plan Form (CFS 1441-A) and must include a written description of "what will be done or what actions will be taken to protect the child(ren), who will be responsible for implementing the components of the safety plan and how/who will monitor the safety plan." (Jt. Ex. 7, Appendix G, at 15.) In addition, "[e]very safety plan must specify the conditions under which the plan is to be terminated and an estimated time frame within which this can be expected to occur." (*Id.* at 14.) The plan must "contain a time frame for implementation and continued monitoring and a contingency plan if the primary safety plan is no longer needed." (*Id.*)

The terms of a safety plan vary depending on the particular case. The plans signed by class members in this case either (1) separated children from their parents, guardians, or other close relatives by removing one or more such individuals from the home, or by imposing no-contact requirements preventing children from having any contact with parents, guardians, or other close relatives; or (2) allowed children and family members to have only supervised contact with each other. Class members are individuals who signed these plans under threat that their children would otherwise be taken into protective custody. *See* Order of 4/16/04 (setting forth revised class definition).

Deputy Director Goad issued a directive on March 22, 2002 requiring that "all safety plans in which family members (children or adults) are relocated from their residence must be approved by the respective Child Protection or Field Service Manager." (DCFS Inter-Office Correspondence Regarding Safety Plans dated 3/22/02.) To approve

such a plan, the manager must consider (1) whether the child is genuinely unsafe; (2) whether the plan will adequately protect the child(ren) in a manner that is minimally disruptive to all family members; and (3) whether there is a reasonable and timely potential resolution to the plan. (*Id.*) Upon approving a safety plan that relocates a family member, the manager is directed to "track them" (presumably, the plan itself or family members subject to it) to "assure the timely and appropriate resolution of the safety plan according to the directions in Appendix G of Procedure 300." (*Id.*)

**2. Agreement to a Safety Plan**

DCFS views all safety plans as voluntary agreements between the Department and the family. Indeed, the child's primary caregiver and, if different, the person(s) most responsible for carrying out the plan must sign the safety plan form, which states that the person has "discussed the safety plan with the investigator/worker, ... understand[s] its contents and that it is voluntary, and agree[s] to abide by the terms and conditions of the plan." (Jt.Ex. 5(c), CFS 1441-A.) The investigator must also sign the form attesting that he or she has "discussed the attached Safety Plan and the consequences of non-compliance with the caretaker and all those who are responsible for carrying out the plan" and that he or she has agreed to "abide by the terms and conditions of the plan." (*Id.*) The form provides contact numbers for both the investigator and his or her supervisor (who must approve the plan) in case a family member wants to communicate with the Department. (Tr. 2287-89.)

August 13, 2002 amendments to Appendix G reinforce the requirement that an investigator must inform a family that safety plans are voluntary:

> The worker who is responsible for implementing the plan must inform the family that their cooperation with the plan is voluntary and--to the extent safely possible--must enlist the family's participation in the development of the plan. When the plan is developed the worker must explain it to the family and must provide the family with information about the potential consequences if the plan is refused or violated. If the family refuses to accept the plan or if the plan is violated, the worker must reassess the situation, consider protective custody and/or referral to the State's Attorney's Office for a court order.

(Jt. Ex. 7, Appendix G, at 14.) The amendments also require investigators to notify all parents or caretakers when a safety plan ends. (*Id.* at 16.)

Notwithstanding these regulatory provisions, Plaintiffs insist that safety plans are coercive. They note that a stated consequence of rejecting the plan or failing to comply with it is the removal of the children from the home. The signature page of the safety plan form expressly states that "[w]e understand that failure to agree to the plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home. I will then have the opportunity to plead my case in court." (Jt.Ex. 5(c), CFS 1441-A.) Most class member witnesses testified that in addition to this written warning, investigators verbally threatened them with removal of their children if they refused to agree to a safety plan. (Tr. 347-49, 392-93, 470-71, 556, 562, 715, 719, 795-98, 1165-66, 1304, 1379.) Faced with this admittedly "tough decision," virtually every parent or caretaker confronted with a safety plan ends up signing it. (Tr. 2311-12 (Goad);

Def. Resp., at 12.)[2] All families do, however, have the option of rejecting the plan.

DCFS procedures require investigators to give the family a copy of their safety plan form, which sets forth the restrictions imposed. There is no requirement, however, that families receive a copy of the CERAP Safety Determination Form, which details the underlying basis for the safety plan as reflected in the investigator's assessment of the 15 safety factors. (Tr. 2290 (Goad) (though giving a CERAP form to families is not prohibited, "there is no policy that guides workers to give it to them either").) There is no evidence that investigators or supervisors have ever given the CERAP form to family members, and none of the plaintiff witnesses in this case ever received one. In Plaintiffs' view, "the resulting [safety plan] agreements are ones in which one of the parties (DCFS) has virtually all the information (*i.e.*, about why the child is considered 'unsafe' and therefore requires a safety plan), and the other party (the 'agreeing' family member) has none." (Pl. Mem., at 20.)[3]

Plaintiffs find this objectionable in part because the safety plan form does not explain the legal standards and procedures DCFS must follow in order to remove a child from the home. *See* Abused and Neglected Child Reporting Act, 325 ILCS 5/5; Juvenile Court Act, 705 ILCS 405/2-7(1), 405/2-8, 405/2-9. Nor is there any explanation as to the type of evidence required to obtain protective or temporary custody of a child. *See infra* pp. 18-20. In addition, the

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[2] Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Second Preliminary Injunction is cited as "Def. Resp., at __."

[3] Plaintiffs' Post-Trial Memorandum in Support of their Amended Motion for a Second Preliminary Injunction is cited as "Pl. Mem., at __."

language of the safety plan forms implies that DCFS has gathered sufficient information to take custody of a child at the time the safety plan is implemented. (*See* Jt. Ex. 5(c), CFS 1441-A) ("[s]afety plans are to be developed only where a decision of 'unsafe' has been made and workers, with supervisory approval, assess that without the plan the child(ren) must be removed from the home"). Plaintiffs claim that, in reality, such evidence is not required in order to find a child "unsafe" pursuant to the CERAP process. DCFS Child Protection Manager Anne Gold, moreover, acknowledged at the trial that "for the cases that end up getting unfounded in [her] office, the likelihood that [DCFS] would have grounds for protective custody on the first day of the investigation is about zero." (Tr. 2982.)

Plaintiffs also question the voluntariness of safety plans that may be implemented before an investigator has spoken with the alleged perpetrator. For example, though safety plans are generally implemented within 48 hours of a Hotline call, DCFS regulations allow for a delay of up to "7 calendar days of the receipt of the report" before the investigator is required to contact an alleged perpetrator who is "different from the parents or caretakers." (Jt. Ex. 2, Procedures § 300.50(c)(6).) In addition, DCFS Procedures require investigators to notify, and defer to law enforcement authorities in certain types of cases, such as those involving allegations of serious physical or sexual abuse. (*Id.* § 300.70; Tr. 2218-19.) If the police ask DCFS investigators not to speak with an alleged perpetrator, investigators normally honor the request but, if possible, construct safety plans even without such contact. (Goad Dep., at 174; Tr. 2697 (Goad).) In some cases, moreover, mere action in conformity with a DCFS request may be deemed an "agreement" to a safety plan. Deputy Director Goad testified, for example, that if an allegedly abusive

father leaves the home on his own accord, "it certainly meets the standard that we would need to meet in order to consider that an adequate plan for the child's safety." (Goad Dep., at 163-64.) (*See also* Tr. 2692 ("[t]here are circumstances where ... it may be impossible ... for the Department to obtain ... express agreement to the plan").)

### 3. Duration of Safety Plans

Safety plans are intended to be temporary, "usually short-term measures" to control serious and immediate threats to a child's safety. (Jt. Ex. 7, Appendix G, at 14; Tr. 2277 (Goad).) The August 13, 2002 amendments to Appendix G provide that safety plans must be reassessed "every five working days following the determination that any child in a family is unsafe." (Jt. Ex. 7, Appendix G, at 4) (emphasis in original.) The assessment

> must continue until either all children are assessed as being safe or all unsafe children are removed from the legal custody of their parent/caretakers. This assessment should be conducted considering the child's safety status as if there was [sic] no safety plan (i.e., Would the child be safe WITHOUT the safety plan?).

(*Id.*) (emphasis in original). The amendments also instruct that safety plans "must be adequate to assure the child's safety but as minimally disruptive to the child and family as is reasonably possible." (*Id.* at 13.) In addition, "[e]very safety plan must specify the conditions under which the plan is to be terminated and an estimated time frame within which this can be expected to occur." (*Id.*)

DCFS does not keep statistical data showing the actual duration of safety plans. (Tr. 2324 (Goad).) A review of the 92 safety plans in the representative

sample cases (which were imposed prior to the 2002 Amendments to DCFS Appendix G) reveals that many plans have indefinite time frames, or fail to state any duration at all. By Plaintiffs' estimation, 31 plans (33.3%) were indefinite in length. (*See, e.g.*, SAI 8, at 28502) (alleged victim's stepfather will move out and have "no contact" with stepdaughter "during the course of this investigation"); SAI 92, at 36157, 36159 (alleged victim's half-brother will move out of the house and have "no unsupervised contact" with his half-sister; plan scheduled to terminate "at the discretion of treatment professional"); SAU 20, at 39869 (mother will not allow daughter "to return to father [a non-household member] until everything is cleared up as to what happened"); SAU 40, at 41317 (alleged victim is not to share a bedroom with his alleged perpetrator brother; the two siblings "must be supervised at all times by a parent until this investigation is complete"; plan termination date is "undetermined at this time").

Plaintiffs further estimate that 53 plans (57%) did not set forth any duration at all. (*See, e.g.*, SAI 34, at 31134 (mother will not allow son (the alleged perpetrator) to have "any contact" with his sister (the alleged victim) and he is not allowed to return home upon release from police custody; duration unspecified); SAI 81, at 35384 (alleged victim not allowed to have "any contact" with her half-brother "at any time"; duration unspecified); SAI 98, at 36690 (father of alleged victim "agreed to leave the residence"; duration unspecified).) In addition, of the 40 safety plans with stated durations of definite length, only one (.025%) was shorter than five days, and six others (20%) were longer than 20 days. (*See, e.g.*, SAI 49, at 32708 (if alleged perpetrator not detained by police, mother will not allow him to return to the house "pending outcome of this investigation"; estimated plan duration, "2--3 months"); SAU 24, at 40137 (father not allowed

visitation rights with his daughter "until such time as it is determined that it is safe to have them continue"; plan to be in effect for "at least 60 days").)

Defendant argues that many of the plans chosen by Plaintiffs as representative "are not safety plans at all." (Def. Resp., at 51.) For example, one file included a safety plan requiring no contact between the alleged perpetrator and victim (whose relationship to each other is unclear though they share a last name), but the plan was implemented after the alleged perpetrator had been arrested and taken to jail, and after a court had already imposed a bond order with the same restriction. (*See* SAI 21, at 29793 ("no time frame c[ould] be imposed as court intervention is necessary"); Tr. 1769.) In another file, similarly, there was a safety plan requiring no contact between the alleged victim, who lived with her aunt, and the alleged perpetrator, the aunt's husband, but Defendant says the plan was unnecessary because the perpetrator was arrested and in jail. (SAI 62, at 33872; Tr.1959; Def. Resp., at 53.) (*See also* Def. Resp., at 52-54.) In still other files, DCFS implemented sexually aggressive children and youth ("SACY") plans which are "used in cases where the child who is the subject of the plan is in foster care, and the child's guardian is the DCFS Guardianship Administrator." (Def. Resp., at 51.) (*See* SAU 2, at 38821.) Several additional files, moreover, did not involve class members. (*See, e.g.*, SAI 12, at 28932 (alleged perpetrator is daughter of woman running an unlicensed day-care service out of her home; alleged victims are children who attended day-care at the home); SAI 38, at 31618 (alleged perpetrator is mother's "live in boyfriend"); SAI 70, at 34522 (alleged perpetrator is mother's paramour).)

Even assuming some of the 92 safety plans are not technically viewed as such by DCFS, it is undisputed that at least some plans are in place throughout the

course of an investigation, regardless how long that may take, and that others fail to specify any duration. Indeed, Deputy Director Goad himself testified that many safety plans last at least as long as the underlying investigation into the alleged child abuse or neglect, and that even when a report is "unfounded," a safety plan may remain in effect (presumably in accordance with its stated terms) if there are "safety issues that would make continuation of a safety plan appropriate." (Tr. 2754 (Goad).) Prior to the August 2002 amendments, moreover, DCFS did not have any procedure requiring that families be notified when a plan had been lifted. (Jt. Ex. 7, Appendix G, at 16.)

### 4. Contesting Safety Plans

Once DCFS has implemented a safety plan, family members subject to the plan may ask that it be modified, or an investigator may initiate modification on his or her own. (Goad Dep., at 253-55, 259-60.) There is no formal procedure for requesting a modification, however, nor is an investigator obligated to respond to, or act upon such a request. (*Id.* at 259-60.) In addition, DCFS has no procedure authorizing those subject to a safety plan to contest it in any way, nor does DCFS advise family members that agreeing to the plan may result in a waiver of their right to contest it. (*Id.* at 227, 259; Tr. 2722 (Goad).)

### 5. Alternatives to Safety Plans

As noted, a family's failure to agree to a safety plan may result in the children being removed from the home. There are two ways this may occur: (1) DCFS may take protective custody of a child pursuant to the Abused and Neglected Child Reporting Act ("ANCRA"), 325 ILCS 5/5, and the Juvenile Court Act ("JCA"), 705 ILCS 405/2-7(1), 405/2-8, 405/2-9

(discussing "temporary protective custody"); or (2) DCFS may obtain a court order granting it "temporary custody" of a child pursuant to the JCA. To take a child into protective custody without court authorization, DCFS must determine that it: "(1) ... has reason to believe that the child cannot be cared for at home or in the custody of the person responsible for the child's welfare without endangering the child's health or safety; and (2) there is not time to apply for a court order under the Juvenile Court Act of 1987 for temporary custody of the child." 325 ILCS 5/5.

After taking protective custody of a child, DCFS must "promptly initiate proceedings under the Juvenile Court Act of 1987 for the continued temporary custody of the child." *Id.* Under the JCA, moreover, "a minor ... taken into temporary protective custody must be brought before a judicial officer within 48 hours, exclusive of Saturdays, Sundays, and court-designated holidays, for a temporary custody hearing to determine whether he shall be further held in custody." 705 ILCS 405/2-9(1). If there is no temporary custody hearing within the prescribed time limitations, protective custody lapses and the child must be returned to his or her home. 705 ILCS 405/2-9(3). Except in emergencies, DCFS Procedures require prior supervisory or management authorization to take a child into protective custody. (Jt. Ex. 2, Procedures § 300.80(f).)

To obtain a temporary custody order, DCFS must file a petition for adjudication of wardship with the State's Attorney in the county in which the child lives. (Tr. 232, 242 (Maganzini).) No such petition may be filed, however, unless the State's Attorney "screens" the case into juvenile court (i.e., accepts the case). (Tr. 232-33.) In Cook County, Illinois, the State's Attorney will not screen a case into court

absent evidence that would, in the view of the attorney screening the case, support a judicial determination that the child should be taken into temporary custody. (Tr. 224, 241, 244.) Such evidence consists of "probable cause to believe that [a child] is abused, neglected or dependent"; that "it is a matter of immediate and urgent necessity for the safety and protection of [the child]" that he be removed from his or her parents' care; and that the state has made "reasonable efforts ... to prevent or eliminate the necessity of removal of [the child] from his or her home, [unless] no efforts reasonably could be made to prevent or eliminate the necessity of removal." 705 ILCS 405/2-10.

If the State's Attorney finds insufficient evidence to screen a case into court, no petition for adjudication of wardship will be filed at that time. Instead, the State's Attorney will issue a form entitled "Ongoing Investigation," which provides the investigator with specific due dates for updating the State's Attorney about the case and/or bringing it back for further screening review. The Assistant State's Attorney completing the form may also instruct the investigator to implement or maintain a safety plan or a "care plan" while the additional information is being gathered. (*See, e.g.*, Ex. E to Defendant's Additional Declarations and Exhibits) ("Def.Supp.") Defendant claims that "care plans" are the same as "safety plans," citing the declaration of Debra Dyer, DCFS's Chief Deputy General Counsel in the Office of Legal Services. (Ex. D to Def. Supp., ¶ 5 (noting that in approximately 40 investigations between December 2003 and October 2004, the State's Attorney decided not to file a petition but requested that DCFS "implement or continue a safety or care plan").) Plaintiffs dispute that safety plans are the same as care plans, but only one of the four sample Ongoing Investigation forms submitted by Defendant mentions a care plan as opposed to a safety plan.

That case involved a parent attending a substance abuse treatment program. (Plaintiffs' Response to Defendant's Supplementation of the Record, ¶ 3; Ex. E to Def. Supp.) In any event, neither party disputes that the State's Attorney has an "open door policy" on re-reviewing cases. (Tr. 250 (Maganzini).)

A third alternative to safety plans is a juvenile court order requiring cooperation with conditions, short of removing the child from the home, that the court deems necessary for the safety of the child (" § 2-25 Orders"). 705 ILCS 405/2-25. To secure a § 2-25 Order, DCFS must first file a petition for adjudication of wardship with the State's Attorney to initiate a juvenile court case. 705 ILCS 405/2-13. The court must find probable cause to believe that the child is abused or neglected, at which point the court has broad authority to enter orders requiring parents or responsible caregivers to take various steps to protect the child from harm. 705 ILCS 405/2-10(1), 405/2-25. For example, a § 2-25 Order may require parents to attend therapy or participate in other services; or forbid persons who are allegedly endangering the child, including parents and caregivers, from having any contact or unrestricted contact with the child.

Finally, although the parties do not address the matter in their briefs, the court notes Plaintiffs' suggestion, at the hearing, that DCFS has an obligation to provide supportive services, including counseling or referrals to therapy, for parents and children in need of such services. Presumably services such as these might eliminate the need for restrictive conditions and thus constitute a fourth alternative to the imposition of safety plans.

## IV.

## EXAMPLES OF THE SAFETY PLAN PROCESS

The court's hearing on Plaintiffs' second motion for preliminary injunction spanned 22 days between September 4, 2002 and January 17, 2003, and generated 3,357 pages of transcript. The following is a summary of several investigations presented at the hearing which involved the implementation of safety plans.

### A. James and Susan Redlin

On June 21, 2002, DCFS investigator Patrick Homa was assigned to investigate an allegation that James Redlin was inappropriately touching his son on a Chicago Metra Railroad train. (Tr. 2336.) Specifically, another passenger on the train told Metra police that James had touched his son's groin area; that the son had put his head in his father's lap and rubbed his father's groin area while the father kissed the back of his neck; and that the father had stated, "Oh, I guess you don't want to be tickled." (PX C, at 71003, 71011.) According to James, he was following a doctor's advice to engage in interactive touching and speech with his son, who suffers from mild autism. (Tr. 688, 690-91, 698-99.)

Homa first contacted the reporter--a Metra police official--for details about the incident, and also attempted (unsuccessfully) to contact the passenger who had witnessed the inappropriate contact. (Tr. 2337-39, 2375-76.) He then went to the Redlin home to see the alleged victim. (Tr. 2339.) Upon arriving at the home, Homa introduced himself to James and his wife Susan, advised them of the allegations against James, and gave them the Notification of a Report of Suspected Child Abuse and/or Neglect (the "CANTS 8 form") explaining the investigative

process. (Tr. 2339-40, 2342.) Approximately 15 minutes into the interview, James requested an opportunity to consult with legal counsel. (Tr. 2341.) At that time, Homa brought up the issue of a safety plan but, after the Redlins accused him of being rude, he left the home with the understanding that he would call the Redlins later that day after they had had a chance to speak with an attorney. (Tr. 2343-44, 2368.) Though Homa had observed the Redlins' son during the interview, he did not speak with him at that time because he wanted to "set up an interview at the [Lake County] Children's Advocacy Center." (Tr. 2342-43.)

Homa called Susan around noon to let her know that he would call back with a safety plan that afternoon. (Tr. 795.) At 4:00 p.m., Homa spoke with Susan by telephone about the safety plan, which required that James not act as an independent caretaker for his son or for any other children until the case was resolved, but which did allow him supervised contact with his son. (Tr. 2345, 2359, 2372, 2460.) Susan agreed to the plan even though it effectively left the family "prisoners" in their own home because Susan, the person responsible under the terms of the plan for supervising the son, is confined to a wheelchair. (Tr. 755, 812-13.) Homa delivered a copy of the safety plan to Susan on June 22, 2000. (Tr. 797, 818-19.) The same day, the Redlins retained the law firm of Lehrer & Redleaf (counsel for Plaintiffs in this case) to represent them during the investigation. (Tr. 742, 758.)

The investigation proceeded slowly in part because the Redlins were resistant to their son being interviewed given his mild autism. (Tr. 733-34.) Between June 21 and August 16, 2000, DCFS attempted unsuccessfully to obtain permission from the Redlins to interview their son at the Lake County Children's Advocacy Center. On at least one

occasion, Homa and his supervisor went to the Redlin home to discuss the matter accompanied by a Lake County deputy sheriff, but the Redlins refused to let their son be interviewed. (Tr. 731-32.) Finally on August 16, 2000, Homa's supervisor sent a letter to the Redlins' attorney stating that the Division of Child Protection was recommending that the allegation against James be unfounded. (Tr. 2351; PX C, at 71014 (Worker Activity Summary dated 8/12/00, noting "no credible evidence to substantiate the alleged allegation; involved youth due to medical reason unable to be interviewed as a credible witness as described by medical professional"); PX C, at 71109.)[4] Nevertheless, the Redlins' attorneys advised them to continue following the safety plan until they received official notification that the plan was unfounded. (Tr. 746-47.) The State Central Register advised the Redlins on September 26, 2000 that it had unfounded the report. (PX C, at 71000.)

**B. Theresa C.**

Theresa C. ran a day care center at her home. On April 3, 2001, Dillon, a child who attended the day care center, fell and suffered a depressed skull fracture while in Theresa's basement, and was taken for emergency surgery at Carl Hospital in Champaign, Illinois. On April 5, 2001, DCFS investigator Lee Boedigheimer was assigned to investigate the incident. (Tr. 591, 2468.) The next day, Boedigheimer spoke with Dr. Powell, the attending physician who saw Dillon at the hospital. Dr. Powell told Boedigheimer that Dillon had

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[4] The court is uncertain why this recommendation was made, but speculates that perhaps the Metra passenger who witnessed the alleged inappropriate touching did not cooperate further with the investigation. It is at least curious that the Redlins' refusal to submit their son for an interview should militate in favor of dismissal of the charges.

undergone surgery to relieve the pressure on his brain, to remove some blood clots, and to repair the fracture. (Tr. 2469-70.) Dr. Powell also stated that the explanation Theresa had given for Dillon's injury when she brought him to the hospital--that he had fallen while pulling himself up on a "Diaper Genie"--was highly unlikely, though not 100 percent impossible. (Tr. 2470-71.)

Also on April 6, 2001, Boedigheimer went to Dillon's home and observed that the entire left side of Dillon's face was swollen and that he had a three-inch incision on the top of his head running down behind his ear. (Tr. 2471- 72.) Shortly thereafter around 11:50 a.m., Boedigheimer went to Theresa's home along with Detective Roberts of the Pontiac Police Department. (Tr. 2472.) Theresa reiterated that Dillon had fallen while trying to climb up on a Diaper Genie while she was changing her own daughter's diaper. (Tr. 2473.) As part of the interview, Boedigheimer looked at the basement where the injury had occurred and noted a thin layer of carpeting over a cement floor. He also observed 13 or 14 children in the home, many of them under the age of two, which he believed was a violation of DCFS licensing standards for day care homes. (Tr. 2473-74.) Boedigheimer asked Theresa about the possibility of suspending her day care activities pending an investigation into Dillon's injury. Theresa stated that she had a vacation planned in any event so the hiatus would not be a problem. (Tr. 2472-74.)

Boedigheimer went back to his office and worked with his supervisor to create some safety plan options to present to Theresa later that afternoon. When Boedigheimer returned to Theresa's home, he gave her a CANTS 8 letter and told her that the reporting doctor (Dr. Powell) did not believe Dillon's injury matched her explanation for it. (Tr. 593,

2481.) Boedigheimer expressed some safety concerns for Theresa's own child, who was Dillon's age, and discussed implementing a safety plan that would require Theresa's mother or husband to supervise her with her daughter pending the investigation. (Tr. 2482-83, 2485- 86.) Theresa did not suggest any alternatives and agreed to the plan proposed by Boedigheimer. At the hearing before this court, Theresa acknowledged that she had an opportunity to read the safety plan forms (excluding the CERAP form), but that she did not in fact review them before signing. (Tr. 560.) She also testified, however, that Boedigheimer told her that "if he left [without a safety plan] and I [Theresa] was alone, they could come back and take [my daughter] S. away from me." (Tr. 562-63.)

Theresa complied with the safety plan in its entirety for about two weeks. As of April 27, 2000, the date she and her family went on vacation to Mexico, however, she no longer adhered to the requirement that she have only supervised contact with her daughter. (Tr. 566-67, 595.) Upon returning home from vacation, moreover, Theresa attempted to resume day care services in her home. When a DCFS representative made an unannounced visit and discovered that Theresa was caring for children in her home again, Theresa closed the day care and took a position as a nanny instead. (Tr. 596-98.) One year later, on May 17, 2001, Theresa learned that the investigation against her was unfounded and that the safety plan was no longer in effect.[5] (Tr. 581, 599.) A May 21, 2001 Family Assessment Factor Worksheet Summary noted that of the three doctors consulted in the case, all reported some

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[5] The parties do not indicate how Theresa learned this information on May 17, 2001. On May 21, 2001, however, Boedigheimer sent Theresa a letter notifying her of the unfounded decision. (PX D. at 43400.)

possibility that Theresa's story was accurate, and one opined that Dillon's injury was not the result of abuse. The document does not reflect when the doctors made these reports. (PX D, at 43301.) Nor is the court certain whether these reports, or some other factor, were the basis for the "unfounded" determination.

### C. Stacey and Patrick D.

Patrick D. and his wife Stacey both worked at a day care center. On January 5, 2001, Karen Beckelman, an investigative supervisor with DCFS, began supervising an investigation into an allegation that Patrick had improperly touched a three-year-old child's bottom during nap time at the center. (Tr. 1509, 1518-19.) Beckelman assigned the case to investigator Andrea Jones and, during an initial meeting, advised her to find out whether Patrick had any biological children; if so, Jones was to look into implementing a safety plan pursuant to Department practice. (Tr. 1525-26.) DCFS insists that Beckelman "did not direct Jones to implement a safety plan" but only to "consider" it. (Def. Resp., at 29-30.) A January 5, 2001 Interview Note signed by Beckelman, however, states: "See the child at the day care. Put in a protection plan with the offender. Make sure he has no children. If he does also put in a plan in his home pending the interview." (PX B, at 44854.)

In any event, Jones spoke with Stacey D. by telephone on January 5, 2001 and, according to Stacey, told her that, due to the Hotline complaint, Patrick had to leave the home or Jones would come and take away their children. (Tr. 470.) Without asking any questions, Stacey denied the allegations on behalf of her husband and said she planned to contact an attorney. (Tr. 472, 838-39.) On January 9, 2001, Forensic Interviewer Kristin Eby conducted a

victim sensitive interview ("VSI") of the 4-year-old alleged victim, who reported that Patrick D. had touched her in a sexual manner. (Tr. 1539; PX B, at 45010.) Both Jones, who was present during the VSI, and Beckelman, who was not, found the statement to be credible. (There is no indication whether DCFS officials consulted with Eby herself regarding the victim's credibility.) Beckelman notified Stacey of the DCFS determination during a telephone conversation on January 10, 2001. (Tr. 1451; PX B, at 45010.) Beckelman also asked Stacey to confirm that Patrick was out of the house, and again informed her that if he was not, Beckelman would remove the children from the home. (Tr. 478.) Beckelman advised Stacey that Patrick needed to obtain a sexual "offender assessment"[6] before he could have unsupervised contact with his own children. (Tr. 1542.)

On January 15, 2001, Beckelman visited the D. apartment and individually spoke to each of the D. children and to Stacey and Patrick. (Tr. 484-85, 489-90.) Before leaving the apartment, Beckelman advised Stacey that the children could start seeing Patrick at church on Sunday. (Tr. 491.) Shortly thereafter on February 5, 2001, Stacey and Patrick met with Jones at a DCFS office. Jones told them that the investigation against Patrick was going to be "indicated" for "sexual molestation" of a four-year-old child and that he needed to have an offender's assessment in order to return to the D. home. (Tr. 501-02.)

DCFS did not proceed with an administrative hearing on the charges against Patrick D. until August 8 and 15 and September 10, 2001. (PX B, at

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[6] DCFS referred Patrick to Latino Family Services, P.C. for his "psychosexual assessment and follow-up treatment recommendations." (PX B, at 44980.)

70509.) On October 16, 2001, an administrative law judge found that the Department had failed to meet its burden of proving that Patrick had sexually molested a child or that he presented a risk of sexual harm to his own children. (*Id.* at 70520.) The ALJ noted that the victim's statements about the alleged abuse were inconsistent (she first said the touching occurred "one time," then later said it happened "every day" at naptime and lasted for "a couple hours"), and that the statements were not corroborated by any other evidence. (*Id.* at 70518.) Kristin Eby, who had conducted the VSI back in January, testified that the victim's "cheerful affect and volunteering of information about abuse are not common among victims of this age." (*Id.*) In addition, the evidence presented at the hearing showed that Patrick "had neither the inclination nor the opportunity to molest" the victim, given that other adults were often present in the room during naptime. (*Id.* at 70513, 70518.) The ALJ recommended that the indicated finding be expunged, noting that the investigation leading to the indicated report was "at a minimum sloppy, and at worst the result of a pre-ordained conclusion." (*Id.* at 70517.) Plaintiffs suggest that at least some of the exculpatory information on which the ALJ relied was, or should have been, available to the investigation at the onset of the investigation. *See DeLaFont v. Beckelman*, 264 F.Supp.2d 650, 654 (N.D.Ill.2003) (noting allegations that during investigation, Patrick D.'s own children and eight children in the day care center denied that he touch them inappropriately; also noting allegation that DCFS failed to interview Patrick D.'s co-teacher who later proved to have pertinent, exculpatory information).

Patrick was cleared of the indicated report on December 4, 2001, and the safety plan which had left him out of his home and unable to have

unsupervised contact with his children was officially lifted on December 10, 2001. (*Id.* at 44779.) As a result of this incident, Stacey D. and her family, represented by Lehrer & Redleaf, filed a lawsuit against several DCFS employees seeking compensatory and punitive damages relating to their actions during the investigation. (Tr. 845.)[7]

## D. Jimmy and Christine Parikh

On July 12, 2001, DCFS investigator Michelle Abernathy was assigned to investigate an allegation that Jimmy Parikh had kissed 11-year-old Deanna K. while she and her siblings were at the Parikh home under the care of Jimmy's wife Christine.[8] (Tr. 2538.) Abernathy spoke with Deanna's father, who stated that though Deanna was temporarily living with him, she had previously lived with his ex-wife, Delta K. Abernathy next contacted Delta K., who advised that her daughter was a liar, that the issue had been resolved at a "family meeting,"[9] and that she did not understand why DCFS was involved. (Tr. 2358-59.)

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[7] *See DeLaFont v. Beckelman*, 264 F.Supp.2d 650 (N.D.Ill.2003) (dismissing several individual defendants from the case for lack of personal involvement in the alleged deprivations, but denying motion to dismiss claims that remaining three defendants violated plaintiffs' constitutional right to family autonomy and that two defendants deprived Patrick D. of his job without due process); *De La Font v. Beckelman*, No. 02 C 5448, 2003 WL 21294741 (N.D.Ill. June 3, 2003) (denying motions to reconsider); *De La Font v. Beckelman*, No. 02 C 5448, 2003 WL 22239726 (N.D.Ill. Sept. 29, 2003) (denying plaintiffs' motion to reinstate one of the previously-dismissed defendants).

[8] It does not appear that there is any family relationship between the Parikhs and the K.'s.

[9] It is not clear from the record who called the family meeting, who attended it, or when it took place.

Nevertheless, Abernathy went to the Parikh home and advised Jimmy, Christine, and their older daughter Justine (age 25) about the allegation. The Parikhs explained that Christine had been caring for three of the K. children and stated that there had been a "family meeting" during which Deanna had not said anything about the alleged incident. (Tr. 1269, 2540.)[10] After learning that there were two minor children living in the Parikh home, Abernathy told the Parikhs that she "would have to put a safety plan in place." (Tr. 2541 (Abernathy).) The plan required that Christine not babysit for any of the K. children and that Jimmy move out of the home and stay with Justine, who resided outside the Parikh home, during the course of the investigation. According to Christine, who says she was "frantic" at the thought of a safety plan, Abernathy warned that if Jimmy did not move out of the house and cease all contact with the minor children living in his home,[11] the children would be taken into DCFS custody. (Tr. 1304-05, 1309.) Abernathy explained the safety plan process and told the Parikhs that they could contact her supervisor to discuss any concerns they had regarding the plan. (Tr. 2540-42, 2547; PX H, at 44096.) Jimmy, Christine, and Justine all signed the plan and Jimmy packed a bag of clothes and left the house. (Tr. 2544.)

At some point prior to the end of July 2001, Abernathy's supervisor modified the safety plan to allow Jimmy to have supervised contact with his own children. Abernathy learned of this modification

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[10] Presumably this was not the same "family meeting" at which, according to Delta K., the matter has been resolved.

[11] In addition to Justine, the Parikhs had four other children: Emmie (age 27), Jason (age 22), Elissa (age 6), and George (age 3). (Tr. 1269.) At the time of the alleged incident, only Jason, Elissa, and George were living in the Parikh home. (Tr. 1270, 1272, 1276.)

during an unannounced visit to the home at the end of July. (Tr. 2553.) Around the same time, the Parikhs retained the law firm of Lehrer & Redleaf to represent them in the investigation. On July 26, 2001, the firm sent a letter to Abernathy's supervisor, John Ott, requesting that the plan be modified or revoked; on August 5, 2001, Jimmy was allowed to return to the P. home.[12] (*See* PX H, at 44045 ("minor resides with father and no longer goes to [the Parikh] home").) The safety plan remained in effect at that time, however, so Christine could not leave the children alone with Jimmy. (Tr. 1327; PX H, at 730001.) Two days later on August 7, 2001, the Parikhs' attorney notified Christine that Abernathy was recommending that the case be unfounded. Abernathy made the decision after speaking with Detective Larry Marks of the Des Plaines, Illinois police force, who told Abernathy that based on the alleged victim's psychological reports, there might be questions regarding the validity of her statements, and he did not believe that the police department would proceed with the case.[13] The attorney nevertheless recommended that the family continue following the safety plan until it was officially lifted on September 26, 2001. (Tr. 1331; PX H, at 730000.)

## E. A.S.

A.S. is the biological mother of two sons, N. and P., and the stepmother of an 8-year-old girl, A. DCFS supervisor Linda Conti became involved with A.S. when the Hotline received a report that her older son, N., had sexually abused his younger brother, P., who was living with his maternal grandparents, the

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[12] The parties do not indicate who decided that Jimmy could return home or how or when the Parikhs were notified of the decision.

[13] It is not clear how Detective Marks became involved in the case.

H.'s, at the time. (Tr. 1455-56, 1458-60.) Conti called A.S. on August 23, 2000 and notified her of the pending investigation but did not disclose any specific allegations so that A.S. would, in Conti's words, "not to be able to taint the investigation." (Tr. 1463; PX F, at 42900.) Though there were no allegations against A.S., Conti recommended that she not have any contact with P. during the investigation out of concern that A.S. might encourage her son to recant or minimize the allegation. (Tr. 1464-65.) A.S. agreed to the recommendation without mentioning that she had an order from the Circuit Court of Winnebago County granting her the right to have contact with P. following her divorce from P.'s father. Nor did A.S. mention that she was involved in a custody battle with the H.'s regarding custody of P. (Tr. 1465-66, 1489; PX F, at 43034, 43036.)

On September 29, 2000, DCFS investigator Shalonda Cawthon called A.S. and told her that the investigation was going to be unfounded. (Tr. 1469-70; PX F, at 42923.) The investigator's notes state that the "perp[etrator] seemed more credible than victim ... Something happened to the victim no proof it was the perp (sib[ling] )." (PX F, at 42921.) Cawthon nevertheless recommended that A.S. be allowed only supervised visits with P. "until the Department receives a completed assessment and recommendations from [a] psychologist." (PX F, at 42933, Letter from S. Cawthon to A.S. of 9/29/00.) By letter dated December 18, 2000, Conti notified A.S. that she no longer needed to be supervised during her visits with P. but should resume shared custody as provided by the court custody orders. (PX F, at 43043.) It is not clear whether this decision was in fact based on a psychologist's recommendation.

## F. Debra C.

In June 2000, DCFS received a Hotline report alleging that Debra C.'s minor children were at risk of harm because two of her children had died years previously under suspicious circumstances, and a third child had almost died.[14] (Tr. 884-85, 896.) Debra C. is the mother of Robert (age 22), Thomas (age 21), Joey (born May 28, 1981, died September 1981), Jennifer (age 14), Steven (age 12), Jonathan (age 7), Jessica (age 8), and Katie (born December 20, 1997, died March 1998). (Tr. 1136-39.) Joey and Katie both died of sudden infant death syndrome. DCFS and the police investigated both deaths and determined that they were unfounded for abuse or neglect. (Tr. 1139-40.) In addition, Thomas reportedly stopped breathing and needed to be resuscitated when he was an infant. (PX G, at 43650, 43651.) In 1995, Debra suffered a breakdown and was diagnosed with bipolar disorder and depression. (Tr. 1142.)

DCFS supervisor Kathleen Tate interviewed Debra on June 8, 2000. Debra disclosed that she suffers from bipolar disorder, and Tate observed that she kept various medications together in a single bottle, which Tate found odd. (Tr. 907-08.) Tate determined that Debra's four minor children were unsafe and required that an older sibling come check on them "every day." (Tr. 916-17; PX G, at 43670.) One week later on June 15, 2000, DCFS implemented a new safety plan which provided that Debra's father and his wife would care for Debra's four minor children until the investigation was complete, but that Debra could have supervised visits with them every day. (Tr. 924-25; PX G, at 16731.) That same day, DCFS

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[14] It is not clear what event triggered the Hotline call.

investigator Eleanor Powell called Debra to notify her of the safety plan. (Tr. 925-26; PX G, at 16593.)

A few days later on June 18, 2000, the children went to visit their non-custodial father, Steven, for Father's Day. Steven did not return the children to Debra's father that night but instead kept them in his custody. Debra notified Powell of the situation during a telephone conversation on June 22, 2000, but Powell indicated that there was nothing she could do because DCFS had not placed the children with Steven. (Tr. 960, 1174-79.)

Toward the end of July 2000, Debra retained the law firm of Lehrer & Redleaf to represent her in the investigation. (Tr. 1229-30.) On July 26, 2000, the Department opened the case for services[15] and attempted to convince Debra to accept assistance from DCFS. (Tr. 946-50.) Specifically, the Department suggested that Debra get a drug and alcohol assessment and a bonding assessment, and that she continue to see her psychiatrist and to take her medication. (Tr. 1213-15.) Debra, however, did not believe that she needed such services and stated that she would only be willing to accept the assistance of a babysitter and a maid. (Tr. 1241-42.) The next day, on July 27, 2000, DCFS attempted to "screen" the case with the State's Attorney's office but the State's Attorney needed additional information from the investigator in order to proceed, such as Debra's psychiatric records and the medical records regarding the children who had died. (Tr.

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[15] Deputy Director Goad testified that "[i]n more serious cases we open in-home protective services cases, which means that we assign a DCFS worker, sometimes called an intact worker, to work with the family." (Tr. 2234.) Kathleen Tate testified that "once [a] case was opened for services then the intact family worker would go out [to see the family] weekly." (Tr. 917.)

936-37, 981; PX G, at 16606.) Also on July 27, DCFS attempted to take protective custody of the C. children, but they were not at the grandfather's home when DCFS arrived with the police. (Tr. 953-55.) Shortly thereafter on August 1, 2000, Kathleen Tate called Daniel Romero, a paralegal with Lehrer & Redleaf working on Debra's case, to inform him that the C. children would be returned (presumably, by their father) to Debra's father by August 7, 2000. (PX G, at 72541.)

For reasons not explained in the record, DCFS voluntarily unfounded the report against Debra on February 28, 2001. (Tr. 976; PX G, at 100257.) According to Tate, in the Department's view, the investigation was not typical because of the nature of the allegations, the past deaths of two of Debra's minor children, the family dynamics, the failure of Debra's psychiatrist to cooperate with the investigation, and the fact that Powell went on medical leave in the middle of the investigation. (Tr. 984-87 (Tate).) Plaintiffs disagree, arguing that "nothing about the handling of the C. case runs contrary to the express and acknowledged policies and practices of DCFS which permit safety plan directives including the loss of custody of children without notice, or any opportunity for a parent to be heard." (Pl. Reply, at 22.)[16]

**G. Drs. S. and M.**

On May 12, 2000, DCFS began investigating Dr. S. and his wife Dr. M. based on a report from a neighbor that she had observed through the window that Dr. S was sexually abusing his eight-year-old adopted daughter. DCFS investigator Martin

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[16] Plaintiffs' Reply Memorandum in Support of their Amended Motion for a Second Preliminary Injunction is cited as "Pl. Reply, at __."

Acevedo went to the family's home but Dr. S. and Dr. M. refused to let him interview the child. (Tr. 331-32, 335-36, PX A, at 70009.) Instead, Acevedo spoke with Dr. S. and Dr. M. for approximately two hours, in part explaining that he and Dr. S. needed to develop a safety plan. Dr. S. ultimately agreed to a safety plan requiring that he leave the home pending the investigation. Dr. S. understood from Acevedo that if he refused to agree to the plan, DCFS would take his daughter away or go to the police. (Tr. 338, 343, 346-48.)

Dr. S. stayed at a hotel over the weekend and by May 15, 2000 had retained Diane Redleaf of the Lehrer & Redleaf law firm to represent him. (Tr. 357, 371.) Ms. Redleaf wrote a letter to Hebert Bashir, a DCP Supervisor, on May 15, 2000 requesting in part that Dr. S. "may return home and remain home as long as his wife is also present." (PX A, at 70045.) That same day, DCP investigator Andrea Jones spoke with Ms. Redleaf and agreed to modify the safety plan to allow Dr. S. to have supervised visits with his daughter during the day. (Tr. 357, 371; PX A, at 70074.) As a result, Dr. S. was able to shield his daughter from the information that he was not sleeping at home at night; he stayed with her until she went to sleep and then returned to the house in the morning before she woke up. (Tr. 358.)

On May 18, 2000, DCFS conducted a victim sensitive interview of the daughter at the Children's Advocacy Center.[17] (Tr. 418; PX A, at 70022.) The next day on May 19, 2000, Jones spoke with Ms. Redleaf and notified her that the case against Dr. S. was being unfounded. (Tr. 358-59; PX A, at 70055.) Though the official notification did not arrive until June 15, 2000, Dr. S. moved back into his home on May 19,

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[17] The name of the person who conducted the interview and the corresponding notes are illegible.

with Ms. Redleaf's approval.[18] (Tr. 359-60, 376; PX A, at 70071.)

**H. E.D.**

On January 11, 2001, DCFS received a Hotline call reporting that sixteen-year-old E.D. had molested four-year-old Q.M. while babysitting for him approximately two years earlier. (Tr. 1414-15.) John Howell was assigned to investigate the allegation on behalf of DCFS. Howell conducted a victim sensitive interview of Q.M. on January 22, 2001. (PX I, at 44140.) Q.M. reported that E.D. "did something bad" to him but then, in Howell's words, "shut down" and refused to continue talking. (*Id.;* Tr. 1417.) Howell next interviewed E.D. and E.D.'s mother, Mrs. D., at the family home on January 25, 2001. According to Howell, E.D. "began to say something which very clearly indicated that he was acknowledging some sort of guilt, some degree of guilt in the allegation," but his mother stopped him and spoke with him privately for a minute. (Tr. 1428.) When E.D. and Mrs. D. returned, they told Howell that they had contacted an attorney; the attorney never authorized Howell to speak with E.D. after that time. (*Id.*)

Before concluding his initial interview, Howell told Mrs. D. that "a safety plan would have to be put in effect removing E.D. from the home for the safety of his [two younger] siblings." (PX I, at 44148 (interview notes); Tr. 1418.) The original plan required that E.D. remain outside the home until he completed a juvenile sex offender evaluation and any treatment recommended pursuant to that evaluation. (Tr. 1421.) Howell told Mrs. D. that if

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[18] Dr. S. retained separate counsel to represent him in a criminal investigation into his alleged misconduct. That investigation did not result in any criminal charges being filed. (Tr. 359.)

she did not agree to the plan, it was possible that DCFS would take custody of the two younger children. (Tr. 1419.)

On February 22, 2001, Howell conducted victim sensitive interviews of E.D.'s siblings, neither of whom made any significant disclosures. (PX I, at 44154, 44155.) During the interviews, Mrs. D. approached Howell and asked him to modify the safety plan. Howell, Mrs. D., and the D.s' attorney discussed a modification and ultimately agreed that E.D. could return home but could have no contact with younger children. In addition, Mrs. D. was required to remain "awake at night when the rest of the family is sleeping, in order to supervise [E.D.] at night." (Tr. 1422-23; PX I, at 44152, 44171(a).) The modified safety plan remained in effect until July 2002. (PX I, at 44177.) E.D.'s case was ultimately indicated for sexual penetration.[19] (Tr. 1428.)

## I. Additional Cases

Plaintiffs rely on the circumstances of two additional cases in support of their motion for preliminary injunction, but do not provide a detailed summary of either case. Plaintiffs first claim that the March 22, 2002 directive from Deputy Director Goad, requiring that "all safety plans in which family members (children or adults) are relocated from their residence must be approved by the respective Child Protection or Field Service Manager," was ignored in two situations. (Pl. Mem., at 32-33.) In the first case, five-year-old I.W. lived with her mother, who had full custody rights, but visited her father on weekends. (DCFS Inter-Office Correspondence Regarding Safety Plans dated 3/22/02; Tr. 3168, 3170.) When I.W.'s mother was accused of abusing

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[19] The record does not reflect when E.D.'s case was indicated.

her, I.W. went to live with her father pending a DCFS investigation. DCFS investigator Cassandra Campbell nevertheless testified that I.W.'s October 14, 2002 safety plan did not constitute a "relocat[ion] from [her] residence" as contemplated by the March 22 directive. It is not clear from the record whether Campbell knew that the mother had full custody of I.W. when she implemented the plan. (Tr. 3170, 3181 (DCFS investigator, Cassandra Campbell).)

Plaintiffs also point to the I.W. case as evidence that DCFS investigators are not following the August 13, 2002 amendments to Appendix G requiring that safety plans be reviewed every five days. (Pl. Mem., at 33.) Specifically, there is no evidence that DCFS conducted any five-day reviews of I.W.'s safety plan even though it was scheduled to last "up to 60 days."[20] (Tr. 2989; PX T, at 45373-74.) In this second case, Plaintiffs submit the declaration of J.J., who signed a safety plan requiring that her husband leave their home pending a DCFS investigation into allegations that he had abused J.J.'s children from a previous marriage.[21] (Pl. Mem., at 23; Pl. Supp., at 2.) It is not clear whether DCFS conducted re-reviews of the plan every five days, but as of January 2004, the plan had been in effect for more than 75 days. (Ex. 1 to Pt. Supp.)

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[20] Plaintiffs do not indicate the actual duration of I.W.'s safety plan.

[21] Plaintiffs also submit the declaration of S.T., who signed a safety plan requiring that her paramour leave their home while DCFS investigated allegations that he was sexually abusing S.T.'s children from a previous marriage. Ex. 2 to Plaintiffs' Motion to Supplement Record in Support of Both their Second Preliminary Injunction Motion and their Motion to Amend the Class Definition (hereinafter "Pl. Supp.") S.T. is not a member of the class, however, because she has no legal relationship with the man required to leave the home. (*See* Order of 4/16/04.)

## Discussion

Plaintiffs raise both substantive and procedural due process challenges to the safety plan process, arguing that DCFS, under threat of seizing class members' children, (1) implements safety plans on the basis of only nominal or no evidence of actual abuse or neglect, and (2) fails to provide any opportunity to contest the plans. Defendant insists that the plans satisfy the compelling public interest in controlling threats to a child's safety during the course of a DCFS investigation, and that all plans constitute voluntary agreements between the families and DCFS. With the limitations described below, the court finds that Plaintiffs are entitled to injunctive relief.

## I.

## PRELIMINARY INJUNCTION STANDARD

Plaintiffs seek a preliminary injunction prohibiting Defendant, a state official, from continuing to implement safety plans absent sufficient evidence of abuse or neglect and an appeal process. To obtain such relief, Plaintiffs must demonstrate (1) a likelihood of success on the merits; (2) irreparable harm if the preliminary injunction is denied; and (3) lack of an adequate remedy at law. *See Reid L. v. Illinois State Bd. of Ed.*, 289 F.3d 1009, 1020-21 (7th Cir.2002). When these threshold conditions have been met, the court must consider (4) the harm that Defendant will suffer if the injunction is granted, balanced against the irreparable harm to the Plaintiffs if injunctive relief is denied; and (5) the interest of, and harm to persons not directly involved in the dispute (the public interest). *Id.* at 1021.

## II.

## LIKELIHOOD OF SUCCESS ON THE MERITS

A likelihood of success on the merits of both Plaintiffs' substantive and procedural due process claims requires some showing of a liberty interest. The court thus first considers whether such an interest exists in this case. The court then addresses in turn the specific due process arguments.

### A. Protected Liberty Interest

It is well-established that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights the [Supreme] [C]ourt has ranked as 'of basic importance in our society,' ... rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). As the Seventh Circuit noted, "the right of a man and woman to marry, and to bear and raise their children is the most fundamental of all rights--the foundation of not just this country, but of all civilization." *Doe v. Heck*, 327 F.3d 492, 517-18 (7th Cir.2003) (quoting *Brokaw v. Mercer County*, 235 F.3d 1000, 1018 (7th Cir.2000)). Similarly, children possess a liberty interest in being raised and nurtured by their parents. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 760, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the natural relationship"); *Heck*, 327 F.3d at 518; *Brokaw*, 235 F.3d at 1018.

The constitutional right to familial integrity, however, is not absolute. *Brokaw*, 235 F.3d at 1019.

To the contrary, this liberty interest "is limited by the compelling governmental interest in the protection of children--particularly where the children need to be protected from their own parents." *Id.* (quoting *Croft v. Westmoreland County Children and Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir.1997)). "Thus, a balance must be reached between the fundamental right to the family unit and the state's interest in protecting children from abuse, especially in cases where children are removed from their homes." *Id.* With these principles in mind, the court considers whether safety plans implicate Plaintiffs' due process rights.

**B. Substantive Due Process**

Plaintiffs claim that safety plans violate their right to substantive due process by depriving them of familial relations without sufficient evidence. In Plaintiffs' view, DCFS should not be allowed to implement a safety plan absent "some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Brokaw*, 235 F.3d at 1019 (quoting *Croft*, 103 F.3d at 1126). Defendant insists that all safety plans are voluntary agreements designed to further the public interest in protecting children and, thus, do not require any specific evidentiary showing. As explained below, the court finds neither party's position entirely persuasive.

Plaintiffs cite to several cases which purportedly demonstrate that safety plans are unconstitutional absent "definite and articulable evidence" of abuse or neglect. In *Doe v. Heck*, 327 F.3d 492 (7th Cir.2003), child welfare authorities received a report that a ten-year-old girl had been bruised during a spanking at a private school. The girl told investigators that another student, John Doe, had also been spanked by

the school principal. *Id.* at 500-01. Based on that report, the investigators interviewed John at his school without his parents' consent and "target[ed] the plaintiff parents [John Doe's parents] as child abusers." *Id.* at 521. At one point in the investigation, case worker Carla Heck left a voice mail message for the Does stating that "if she did not hear from their attorney within 24 hours, 'the Bureau will take steps to ... protect the children in your home ...' " and that she was " 'not messing around anymore!' " *Id.* at 505-06. The child welfare authorities never in fact removed any of the Doe children from their home, but the Does claimed that "[t]hroughout ... the Christmas season," they "lived in constant fear" that the authorities would do so. *Id.* at 506 n. 10.

The Does and others filed suit, alleging in part that the defendant child welfare authorities had violated the Does' right to familial relations and their Fourteenth Amendment procedural due process rights. *Id.* at 508. The district court granted summary judgment to the defendants, finding that even if their actions were unconstitutional, they were protected by qualified immunity. *Id.* The Seventh Circuit reversed, however, concluding that the defendants violated the Does' liberty interest in familial relations by targeting them as child abusers without any evidence that the Does themselves had ever abused their children or that their children had ever been injured as a result of a school spanking. *Id.* at 521-22. Despite the absence of any such evidence, the defendants launched an investigation based solely on another child's claim that John had been spanked (not injured) by the school principal (not John's parents).

The court concluded, similarly, that the threat to remove John and his sister from their parents' custody violated the Does' liberty interest in

maintenance of the family unit. *Id.* at 524. The court recognized that "child welfare caseworkers are often called upon to make difficult decisions without the benefit of extended deliberation," and that "there is, perhaps, no more worthy object of the public's concern than preventing the most vulnerable members of society, children of tender years, from being physically abused." *Id.* at 525. On the facts presented, however, it was not "difficult to weigh [the] state's interest in investigating an allegation of child abuse against [the] parent or child's right to familial relations" because "the defendants had no basis to suspect the plaintiff parents of child abuse, and thus had no reason to interfere with their familial relationships in the manner described." *Id.*

With one exception, the cases presented at the hearing before this Court are distinguishable from *Heck* because they involve allegations of abuse or neglect on the part of the parent or child under investigation. Thus, unlike in *Heck,* the Plaintiffs' right to familial relations here does not, in each instance presented above, obviously outweigh the state's interest in investigating allegations that Plaintiffs have engaged in child abuse or neglect. The A.S. case does involve a mother who was not allowed to see her son for approximately one month while DCFS investigated an allegation that the boy had been abused by his older brother. Unlike the Does, however, A.S. was aware of the investigation at all times and did not object to the arrangement. Plaintiffs dispute that A.S.'s agreement was voluntary--an argument the court addresses *infra* pp. 46-54--but the court notes that she signed the safety plan without advising the investigator about the court order granting her the right to have contact with her son, P.

As noted, Plaintiffs view *Brokaw* as setting forth the requirement of "definite and articulable evidence" of

abuse or neglect before a safety plan may be implemented. The plaintiff in *Brokaw* alleged that certain relatives and a deputy sheriff conspired to end his parents' marriage by filing "baseless and scurrilous" claims of child neglect with DCFS that they believed "would cause [the plaintiff] and his sister to be removed from their parents' home, and in turn prompt [the father] to divorce his wife and leave his family." 235 F.3d at 1007. At some point after the relatives made the allegedly baseless claims of neglect, two police officers walked into the plaintiff's home, grabbed him and his three-year-old sister, and carried them crying out of the home. The men did not explain what was happening and the six-year-old plaintiff believed he was being kidnapped and would be killed. *Id.* The children remained in foster care for approximately four months before being returned home. *Id.* at 1008. Upon reaching the age of majority, the plaintiff filed a complaint, alleging in part that his relatives and others had violated his substantive due process right to familial relations. *Id.* at 1017-18. The district court dismissed the claims for failure to state a claim or, alternatively, based on sovereign, absolute, or qualified immunity. *Id.* at 1008.

The Seventh Circuit reversed, finding that the plaintiff had sufficiently alleged a due process claim covering the four-month period during which he was separated from his parents. The court noted that the constitutional right to familial integrity must be balanced against the state's compelling interest in protecting children from abuse, "especially in cases where children are removed from their homes." *Id.* at 1019. "In balancing these interests, courts have recognized that a state has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Id.* On a motion to

dismiss, the court lacked sufficient facts to determine whether the government was justified in interfering with the plaintiff's familial relations. The court also lacked sufficient facts to determine whether any of the individual defendants were entitled to qualified immunity. The court noted, however, that in general, "because the balance between a child's liberty interest in familial relations and a state's interest in protecting the child is nebulous at best, social workers and other state actors who cause a child's removal are entitled to qualified immunity because the alleged constitutional violation will rarely--if ever--be clearly established." *Id.* at 1023.

*Brokaw* is not particularly illuminating to the extent it involved children who were forcibly removed from their parents' home by two men who refused to identify themselves. In this case, Plaintiffs, all adults capable of communicating with child welfare authorities, knew that there was an investigation pending against them and agreed at least in form, however reluctantly, to cooperate with the plan by removing themselves or their children from the home. In addition, the children in *Brokaw* were placed in foster care and deemed wards of the state for four months; they did not remain with parents or relatives as in this case. The *Brokaw* court did note that other courts have required "definite and articulable evidence giving rise to a reasonable suspicion" of abuse or neglect, but did not explain what satisfies this requirement, particularly with respect to the imposition of safety plans such as are at issue here.

Plaintiffs also claim that the Supreme Court's decision in *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) "reinforces the conclusion that safety plans work significant deprivations, even when the deprivation is less extreme than removal of the child." (Pl. Mem., at

39.) The plaintiffs in *Troxel* sought visitation rights with their grandchildren under a Washington state statute that allowed "any person" to petition for forced visitation of a child. The children's mother wanted to limit the grandparents' visits to once per month, but a Washington Superior Court granted the plaintiffs' request for greater visitation rights as in the best interests of the children. *Id.* at 61-62, 120 S.Ct. 2054. The Washington Court of Appeals reversed, however, and the Washington Supreme Court affirmed that decision, reasoning that the Washington statute was unconstitutional because it allowed the State to interfere with the right of parents to rear their children without any threshold showing of harm, and because it allowed "any person" to seek visitation rights without recognizing that "[p]arents have a right to limit visitation of their children with third persons." *Id.* at 61-63, 120 S.Ct. 2054. *See* Wash. Rev.Code § 26.10.160(3) ("[a]ny person may petition the court for visitation rights at any time ... The court may order visitation rights for any person when visitation may serve the best interest of the child").

The United States Supreme Court granted certiorari and affirmed that the Washington statute, as applied, unconstitutionally infringed on the mother's fundamental right to make decisions concerning the care, custody, and control of her children. *Id.* at 66-67, 120 S.Ct. 2054. In reaching this conclusion, the Court found it significant that "the [plaintiffs] did not allege, and no court has found, that [the mother] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." *Id.* at 68, 120 S.Ct. 2054.

Although some of the language of *Troxel* is instructive, its rationale is not directly relevant here, either. In the Supreme Court's view, the problem

"[wa]s not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters' best interests." *Id.* at 69, 120 S.Ct. 2054. In this case, conversely, safety plans are imposed on parents who are under suspicion of being unfit. Nor are questions regarding visitation rights directly comparable to investigations into allegations of abuse or neglect.

In short, none of these cases supports Plaintiffs' assertion that DCFS violates the Constitution when it implements safety plans absent "definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." (Pl. Mem., at 43) (citing *Brokaw,* 235 F.3d at 1019). Indeed, none addresses the situation presented here where a parent, legal guardian, or child is directly accused of abuse or neglect, thus calling into play the state's compelling interest in protecting a child's safety. The court recognizes that safety plans impose difficult restrictions upon families and, while they are in effect, deprive families of their right to familial relations. To determine whether such deprivation amounts to a constitutional violation, however, it must be balanced against the state's interest in protecting children. That interest is "extraordinarily weighty." *Darryl H. v. Coler,* 801 F.2d 893, 902 (7th Cir.1986). As the Seventh Circuit explained:

> The state has an obligation to prevent loss of life and serious injury to those members of the community to whom it has a very special responsibility, the young. As the Supreme Court remarked in *Wyman v. James,* 400 U.S. 309, 318, 91 S.Ct. 381, 386, 27 L.E.2d 408 (1971), "There is no more worthy object of the public's concern."

*Id.* Safety plans are designed for this very purpose: to protect children from harm during the course of a DCFS investigation.

Plaintiffs express concern that it is not always clear that a child is in any danger at all, such as when a child is merely "afraid" of persons who live in or visit the home. In addition, safety plans are often implemented even when only one of the 15 safety factors is checked "yes." (Pl. Mem., at 14 n. 8) (arguing that 61 of the 92 safety plans in the representative cases (66%) went into effect based on the presence of only one safety factor). Defendant insists that "many of these so-called safety plan cases do not involve safety plans at all," noting, for example, that some plans imposed no contact requirements only after an alleged perpetrator had been taken to jail and a court had imposed the same restriction. (Def. Resp., at 52-54.) Defendant cannot escape liability, however, by imposing conditions on Plaintiffs and then claiming that they did not technically constitute "safety plans."

The court recognizes that several plans in the sample cases were directed against non-class members, such as paramours of the alleged victims' mothers. The fact that some of the persons subject to safety plans are not class members does not speak to the proper standard required for implementing such a plan, however. Where an investigator has found even a single safety factor, the court finds that it is not improper for DCFS to err on the side of caution given the significant state interest in protecting children from harm. Under such circumstances, the court is satisfied that the state's interest in protecting children through brief or temporary safety plans outweighs Plaintiffs' right to familial relations, even upon a mere suspicion of abuse or neglect. The opposite conclusion may result in children being further abused or neglected during the course of a

DCFS investigation, which is what prompted the CERAP process in the first place. (Tr. 2243-44); 20 ILCS 505/21(e).

In the court's view, the safety plan imposed upon Drs. S. and M. represents the type of brief deprivation that is insufficient to trigger constitutional concerns. That plan went into effect on May 12, 2000 and required Dr. S. to leave the home pending an investigation into a neighbor's allegation that she had seen him through a window abusing his adopted daughter. By May 19, 2000, the case against Dr. S. was unfounded and he moved back into his home. Though it is regrettable that he had to spend a week away from his family, the court concludes that he did not suffer an unconstitutional deprivation of his right to familial relations as a result. On the other hand, Patrick D. was required to leave his home on January 5, 2001 due to an allegation that he had improperly touched another child during nap time at the day care center where he worked. His case was "indicated" for abuse in February 2001 but he did not receive an administrative hearing on the charges until August 8 and 15 and September 10, 2001. On October 16, 2001, relying at least in part on information available to the investigation from the beginning, an ALJ determined that the charges were unfounded and based on a "sloppy" investigation. The safety plan was not officially lifted, however, and he was not permitted to live with his children (none of whom were victims of the alleged abuse) until December 10, 2001--nearly a year after it forced him out of his home.

Even where the initial investigation supports imposition of a safety plan, the court believes such a plan may not remain in place indefinitely; to the contrary, at some point, the deprivation continues long enough to implicate Plaintiffs' liberty interests

and substantive due process rights. Neither party has provided useful insight into when this occurs. Plaintiffs insist that a deprivation lasting even a single hour is enough to run afoul of the Constitution. Defendant maintains that there can never be a constitutional deprivation because families always sign the safety plan and thereby agree to its terms. The answer lies somewhere in between, but absent adequate development of this issue by the parties, the court is not prepared to draw the line. The court does find, however, that safety plans lasting only a few hours or days do not implicate substantive due process rights even when coupled with a threat of protective custody. On the other hand, safety plans signed under such a threat do implicate substantive due process rights when they have no stated duration or an indefinite duration (*e.g.*, they are in effect "during the course of this investigation" (SAI 8, at 28502) or until a date "undetermined at this time" (SAU 40, at 41317)), at least where such plans continue for several days.

## C. Procedural Due Process

Plaintiffs next argue that safety plans violate their procedural due process rights because they do not provide any opportunity to contest them. To establish that their procedural due process rights have been violated, Plaintiffs must demonstrate that (1) the Department deprived them of a constitutionally protected liberty or property interest; and (2) the deprivation occurred without due process of law. *Heck,* 327 F.3d at 526. Plaintiffs note that a "fundamental requirement of due process is the opportunity to be heard." (Pl. Mem., at 44) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) (internal quotations omitted)). Though Plaintiffs recognize that pre-deprivation process may be excused by exigent circumstances, they also stress that "the only

meaningful opportunity to invoke the discretion of the decision maker is likely to be before the [deprivation] takes effect." (Pl. Mem., at 44-45) (quoting *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 543, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).)

The court has already determined that safety plans that separate children and families do deprive class members of familial relations. In addition, it is undisputed that DCFS provides no opportunity to contest safety plans, nor any notice of such an opportunity. Defendant once again argues that no process is due because safety plans are completely voluntary agreements. According to Defendant, "[i]ndividual parents are free to make a choice, albeit a difficult one, between protective custody of their child and the entry of a safety plan to keep the child safe." (Def. Resp., at 45.) While this may be true in a formal sense, for the reasons explained below, the court does not agree that Plaintiffs' formal acquiescence in plan terms extinguishes their procedural due process rights.

**1. Voluntariness**

Defendant relies on *Terry v. Richardson,* 346 F.3d 781 (7th Cir.2003) and *Doe v. Tullis,* No. 01-2044, slip op. (C.D.Ill. Nov. 25, 2003) in support of his assertion that all safety plans are voluntary. The plaintiff in *Terry* was a non-custodial father with rights to visit his daughter, Jaidah, pursuant to a divorce decree. 346 F.3d at 782. The plaintiff's ex-wife suspected that he was sexually abusing Jaidah and Jaidah confirmed the suspicion, telling her mother that her father had "hurt her, kissed her 'pee-pee,' forced her to swallow a necklace, tried to make her kiss his 'noodle,' and jammed crayons and a pen into her anus." *Id.* Jaidah's mother reported the plaintiff to the DCFS Hotline, and the next day, a DCFS investigator called the plaintiff and left a

message on his answering machine stating that he was to "cease all visitation and contact with [Jaidah]." *Id.* at 782-83. When the plaintiff returned the investigator's call, she told him that she could not explain the allegations over the phone and repeated that he was not to contact Jaidah. According to the investigator, the plaintiff responded "okay" or "I understand." *Id.* Two weeks later, the investigator interviewed the plaintiff at his attorney's office. At that time, she described the allegations against him and explained the investigation process. She also reiterated that the plaintiff was not to have any contact with Jaidah during the investigation. The plaintiff complied because "he had learned from 'news reports and things' that ignoring DCFS instructions could lead to termination of his parental rights or Jaidah's placement in a foster home." *Id.* at 783- 84.

After more than a year of proceedings, a court found that Jaidah had been abused, but not by the plaintiff, who was cleared of the allegations. The plaintiff filed suit against the investigator for violating his and Jaidah's due process rights and a jury found in favor of the plaintiff and his daughter. *Id.* at 784. In reversing that decision, the Seventh Circuit first determined that the plaintiff's deprivation, which ultimately amounted to losing just a single day of visitation, was minor compared with the state's substantial interest in protecting children from sexual abuse. *Id.* at 786. The court found it significant that the investigator did not try to sever the plaintiff's parental rights or remove Jaidah from his custody. *Id.* In addition, "a reasonable person with the resources available to [the plaintiff] would not have left [the investigator's] authority unquestioned," and could have refused to comply with the investigator's instruction. *Id.* at 785, 787. "Given the interests at stake, the options available to [the plaintiff] were enough to guard

against erroneous interference with his rights." *Id.* at 787.

*Terry* is distinguishable from this case in several respects and does not, in this court's view, establish that safety plans are by definition voluntary. First, the investigator in *Terry* never threatened to put Jaidah in protective custody; rather, the plaintiff merely "heard on television that disobeying DCFS caseworkers could spell the end of his parental rights or lead to foster care for Jaidah." *Id.* at 785. In this case, conversely, all class members were threatened that their children would be placed in protective custody if they refused to accept a safety plan. In addition, the plaintiff in *Terry* lost only a single day of visitation with his daughter, whereas most of the Plaintiffs in this case tost physical custody of, or contact with children and family members for several months. Significantly, many of the safety plans had indefinite or unstated durations.

Defendant next points to *Doe v. Tullis,* in which DCFS investigated plaintiff John Doe after receiving a Hotline report that he had sexually abused a child while he was babysitting for her one night. Slip op., at 2-3. The investigator interviewed the alleged victim and her sibling; the victim's mother; the hospital pediatrician who examined the victim and reported the abuse; and the pediatric social worker at the hospital. *Id.* at 3. The investigator also interviewed three of the Does' own children and one of their neighbors. Before speaking with John's wife, Jane Doe, the investigator and her supervisor discussed a possible safety plan for the family. After interviewing Jane, the investigator drafted a safety plan that required John to live outside the home and prevented him from having any unsupervised contact with his children "until we were further along in our investigation." *Id.* at 4. The investigator explained that violating the safety plan could result in the

children being removed from the home. According to the investigator, Jane agreed to the plan. *Id.* at 4-5.

Five days later, Jane signed a second safety plan with the following terms: "Jane Doe will allow [John Doe] no contact whatsoever with any children who are younger than eighteen; John Doe will not be in the home without approved supervision at any time when younger children are home; and in order for the plan to terminate, John Doe must obtain a sex offender assessment and follow any recommendations, and all safety factors must be resolved as determined by DCFS, with regard to the sexual abuse." *Id.* at 6. After the report against John was indicated, Jane and John signed (in the presence of their attorney) a third safety plan adding, in part, that (1) John could not live in, spend the night in, or be in the home "any time other than approved visiting time," (2) "CPI will continue to monitor the plan until the case is complete," and (3) "violation of the plan will result in protective custody of the Doe children." *Id.* at 6-7. The investigator believed that the plan was to remain in effect until she completed her investigation approximately two months later, but she did not notify the Does or their attorney that the plan was no longer in effect after that date. *Id.* at 7. John appealed the indicated finding; there is no indication as to whether his request for expungement succeeded. *Id.* at 21.

The Does filed suit against the investigator and her supervisor alleging violations of their constitutional rights. The Does first claimed that the defendants violated their right to familial relations by threatening to remove the Doe children from their parents' custody. *Id.* at 12. The court agreed that "threatening to remove children from their parents' custody violates the right to familial relations when the state has no reason to suspect that the parents are abusing the children." *Id.* at 13 (citing *Heck,* 327

F.3d at 524). The court found no such threat in that case, however, because the investigator merely "provided an alternative to removal when she told Jane Doe that she could take the children to stay with friends or family." In the court's view, "[r]equiring Jane Doe and the Doe children to stay with family and friends is not the equivalent of threatening to remove the children." *Id.* In reaching this conclusion, the court noted that "[a] safety plan is an optional and less disruptive alternative to either removing a child from his home based on a court order or removing a child and then seeking a court order." *Id.* at 14. According to the court, informing parents of the legal alternatives available to the Department, including removal of the children prior to a court order in exigent circumstances or pursuant to a court order, does not automatically constitute a threat sufficient to deprive parents of their constitutional rights. *Id.* The court denied summary judgment on the claim, however, based on a factual dispute as to whether the investigator had "repeatedly threatened to take the children away." *Id.*

The Does also claimed that the defendants violated John Doe's procedural due process rights by separating him from his children for more than seven months without an adequate investigation or a hearing. *Id.* at 15, 19. The court agreed that "[h]ad [the investigator] indeed failed to perform an investigation before instituting the safety plan, her decision would have failed to satisfy the 'reasonable suspicion' standard established in *Brokaw.*" *Id.* at 17. Before instituting the first safety plan, however, the investigator "had already performed substantial investigation," including interviewing the alleged victim, her mother and sibling; the pediatrician who reported the alleged abuse; a pediatric social worker; Jane Doe and three of her children; and one of the Does' neighbors. *Id.* at 16-17.

As for the hearing, the court first determined that the Does voluntarily agreed to the conditions and terms of the safety plan. *Id.* at 20. The court rejected the Does' argument that they were forced to sign the plan, finding that "[k]nowing the possible legal consequences of failing to participate in a safety plan [*i.e.*, having your children taken away] does not render involuntary one['s] agreement to participate." *Id.* at 20 n. 4. The court distinguished safety plans from the forcible removal of children from the home, noting that safety plans "provide an alternative way, based on the parents' cooperation, for the state to ensure the children's safety while allowing them to remain in their home." *Id.* at 22. The Does "always had the right to contact DCFS to determine when or how the safety plan might be ended ..., bring a suit in state court, or simply refuse to comply with the safety plan, which would have led to judicial intervention if DCFS intended to continue to keep John Doe separated from his children." *Id.* The Does failed to demonstrate that the hearing John received in seeking to expunge the indicated finding was inadequate, leading the court to conclude that John was not denied procedural due process. *Id.* at 21, 23.

The court is not persuaded that *Tullis*, an unreported decision from another district court, conclusively establishes the voluntariness of all safety plans. Though the *Tullis* court found no automatic threat when DCFS notifies parents that their children may be removed from the home absent a safety plan, it nonetheless denied summary judgment because questions of fact existed as to whether the investigator had "repeatedly threatened to take the children away." *Id.* at 14. All of the class members in this case were in fact threatened explicitly or implicitly with protective custody unless they agreed to a safety plan, which arguably adds a coercive element to the "agreement" process. In addition, unlike in *Tullis*, it is not clear that DCFS

"substantially investigated" the allegations against all Plaintiffs in this case prior to implementing a safety plan. In the Stacey and Patrick D. case, for example, the DCFS supervisor advised the assigned investigator to "put in a plan" at Patrick's home if he had small children, before anyone had actually spoken with the D. family or the alleged victim. (Tr. 1525-26; PX B, at 44854.)

Finally, the plaintiffs in *Tullis* failed to show that the expungement hearing provided inadequate process even though the proceeding did not address the conditions of the safety plan. *Id.* at 21, 23. Not all investigations, however, result in an "indicated" report or any opportunity for an expungement hearing. In addition, while the *Tullis* court noted that safety plans require the cooperation of parents and family members, it failed to address how "repeated[ ] threat[s] to take the children away" may affect a family's decision in that regard.

Both parties ask the court to consider the "totality of the circumstances" in assessing whether safety plans are voluntary, drawing by analogy from the criminal law on consent to a police search. (Pl. Mem., at 49; Def. Resp., at 48) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).) Plaintiffs argue that relevant factors include (1) whether DCFS makes any misrepresentations in securing agreement to the plan; (2) whether agreement to a plan is knowing and voluntary; (3) whether a class member had access to legal counsel or other advice; (4) the circumstances surrounding DCFS' request for agreement, including any time pressure and the state of mind of the class member; and (5) the relative power, authority, knowledge, and sophistication of the parties. (Pl. Mem., at 53-54.) Defendant insists that "knowledge of the right to withhold consent is not a prerequisite to proving that consent to a search was given." (Def. Resp., at 48)

(citing *Schneckloth*, 412 U.S. at 227, 93 S.Ct. 2041) ("[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.") Defendant also argues that

> under the current DCFS structure, and after administering the CERAP protocol, the "threat" to remove the children unless a safety plan is agreed upon would not be baseless or empty, rather it would be analogous to the Constitutionally permissible consent search situation in which the police threaten "in good faith" to get a warrant to search.

(*Id.* at 49.)

As noted earlier, the court agrees that there is clearly an element of choice to the safety plan process in that Plaintiffs at all times remain free to reject a plan. Moreover, some families may affirmatively welcome a safety plan.[22] For example, a mother who learns that her spouse may be sexually abusing her child may be relieved that DCFS agrees that her husband should leave the home pending an

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[22] Plaintiffs themselves reviewed several cases "in which they thought it likely that the class member's agreement to the plan was not coerced because a class member parent: (1) had agreed with DCFS that the alleged perpetrator class member was likely to be guilty of the alleged abuse; (2) had a concern (independent of any representations by DCFS) as to the merits of the allegations against the alleged perpetrator, regarding the safety of the children in the home if the perpetrator was not subject to restrictive conditions regarding his access to the children; and (3) had already taken the action of removing the perpetrator from the home, prior to and independently of any request an investigator had made as part of a proposed safety plan." (Pl. Mem., at 47 n. 22.)

investigation.[23] Nevertheless, we are faced here with a situation where DCFS investigators threatened to take away Plaintiffs' children if they refused to accept a safety plan, without affording any procedure for contesting that plan or its terms. Plaintiffs claim that the threat is found in the language of the Safety Plan Form itself, which states that "failure to agree to the plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home." (Jt.Ex. 5(c), CFS 1441-A; Pl. Mem., at 50-51.) This language may not by itself constitute a threat of actual removal, as it merely notifies Plaintiffs of what "may" or "possibl[y]" will happen should a family choose to reject a plan. Indeed, the same paragraph expressly represents that agreement to a plan is voluntary. (*Id.*) *See also Tullis*, slip. op., at 20 n. 4. ("[k]nowing the possible legal consequences of failing to participate in a safety

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[23] Plaintiffs insist that this is irrelevant, at least for purposes of substantive due process rights, because "DCFS may not constitutionally effect what would other wise be an unconstitutional deprivation of one parent's rights simply by gaining the agreement (even the voluntary agreement) to the deprivation by the other parent." (Pl. Mem., at 42) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (state denied unwed father equal protection of the law by declaring his children wards of the state upon their mother's death and presuming that he was an unfit parent without first giving him a hearing on the issue); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923-24 (5th Cir.2000) ("[w]hen a biological parent com[es] forward to participate in the rearing of [her] child, [her] interest in personal contact with [her] child acquires substantial protection under the due process clause") (internal quotations omitted)). Assuming this is true, as explained earlier, the court concludes that where there is evidence of a safety concern, the state's interest in ensuring the safety of children by imposing a temporary safety plan outweighs a parent's liberty interest in caring for and associating with the child, at least for a brief period.

plan [*i.e.*, having your children taken away] does not render involuntary one['s] agreement to participate").

More troubling, however, is the fact that most class member witnesses testified at the hearing that the investigator assigned to their cases did more than just notify them of their options; instead, the investigator affirmatively threatened to take away Plaintiffs' children unless they agreed to a safety plan. When an investigator expressly or implicitly conveys that failure to accept a plan will result in the removal of the children for more than a brief or temporary period of time, it constitutes a threat sufficient to deem the family's agreement coerced, and to implicate due process rights. Significantly, Defendant has not identified a single family that, faced with such an express or implied threat of protective custody, chose to reject the plan.

As for Defendant's suggestion that the threat to remove children from the home is analogous to a police officer's threat to obtain a search warrant, the court is unpersuaded. If a criminal suspect declines to consent to a search, law enforcement officials may well be able to conduct a search in any event without consent, but only after obtaining a warrant from a court. If, however, a family declines to consent to a safety plan, DCFS can take protective custody of their children without first obtaining a court order. The protective custody would then trigger court process and a hearing within 48 hours, but the ability to take the children first and obtain court approval later distinguishes DCFS procedures from those in the criminal context. Moreover, seizure of one's children, even for 48 hours, is arguably more intrusive than searching one's home.

Plaintiffs devote significant attention to arguing that they did not knowingly and intelligently waive their due process rights by signing the safety plans. (Pl.

Mem., at 55-62.) The court recognizes that DCFS procedures do not mandate that investigators explain the actual requirements for taking a child into protective custody or the available options for contesting such action. In addition, families faced with the choice between entering a safety plan or losing their children may not be capable of making an informed, rational decision, or seek the advice of an attorney. Nevertheless, the court need not decide whether or to what extent this or the other factors may also figure into the voluntariness assessment. It is sufficient that agreement to the plans at issue here was secured in a coercive manner under the investigator's express or implied threat of protective custody lasting more than a brief or temporary period of time.

**2. Process Due**

Having determined that safety plans effect a constitutional deprivation when combined with an express or implied threat of protective custody that is more than brief or temporary, the court next considers what process is due to class members who sign such plans. The parties agree that *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) guides this analysis:

> Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 334-35, 96 S.Ct. 893.

It is undisputed that Plaintiffs have a "fundamental" liberty interest in familial relations. *Troxel,* 530 U.S. at 65, 120 S.Ct. 2054 ("the interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court"). It is also undisputed that child safety is an important state interest. *Darryl H.,* 801 F.2d at 902 ("[t]he state has an obligation to prevent loss of life and serious injury to those members of the community to whom it has a very special responsibility, the young"). The relevant inquiry thus turns on the risk of an erroneous deprivation of Plaintiffs' interest in familial relations under existing DCFS procedures, and the probable value of additional or substitute procedural safeguards. *Mathews,* 424 U.S. at 334-35, 96 S.Ct. 893. On this issue, the balance weighs decidedly in Plaintiffs' favor: DCFS has no procedure whatsoever for families to contest safety plans. Defendant insists that "each circumstance is unique," and that "[t]he case law is clear and the facts are overwhelmingly illustrative of the singularity and distinctiveness of each case." (Def. Resp., at 54.) The fact that individual circumstances are unique does not, however, support the conclusion that no family members are entitled to a procedure to contest safety plans.

To be sure, some cases involving safety plans result in "indicated" reports. Nevertheless, the liberty interest in familial relations is so great that even a small risk of erroneous deprivation must be addressed in some fashion. Indeed, DCFS's own expert, Dr. Mark Testa, agreed that the availability of procedures to contest a safety plan would not alter the effectiveness of the CERAP process. (Tr. 2829-30.) Defense expert Dr. Carl Bell also opined that if DCFS is unable to work out an acceptable safety

plan with a family because, for instance, the investigator failed to consider family strengths and mitigating circumstances, "there ought to be--that family should have some sort of a review[,] something in place so that that could be corrected." (Tr.2021- 22.) In the court's view, it would not be difficult for DCFS to develop a simple and inexpensive procedure for Plaintiffs to seek review of safety plans. To the extent DCFS is correct that there is a degree of voluntariness in all of the plans--and some plans are in fact entirely voluntary--there presumably will be no request or need for review in a large proportion of the cases.

Neither party addresses the nature of the procedures required, and the court declines to fashion a remedy unilaterally. Nonetheless, the court offers the following observations. To the extent safety plans serve as less intrusive alternatives to protective custody, it cannot be the case that class members are entitled to equal or greater remedies than those provided under the Abused and Neglected Child Reporting Act and the Juvenile Court Act. Those statutes require a hearing before a judicial officer within 48 hours of the child's removal from the home, a time frame too restrictive for the safety plan context.[24] In addition, it seems to this court that making families wait an entire month before giving them an opportunity to contest a plan may be excessive. Indeed, the August 2002 amendments

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[24] Plaintiffs' suggestion, in a footnote, that DCFS should be required to provide a hearing before implementing a safety plan except in exigent circumstances, is not consistent with this opinion. Nor is the court confident that three days is an appropriate length of time within which to conduct a hearing. (Pl. Mem., at 87 n. 30) (citing *Jordan by Jordan v. Jackson*, 15 F.3d 333, 351 (4th Cir.1994).) The *Jordan* court merely approved, as an "outer limit," a 65-hour delay between protective custody of a child and a hearing before a judicial officer.

(which were not in place during most of the episodes described above) recognize the importance of vigilantly monitoring safety plans by requiring re-review every five days. It is not clear that investigators are complying with this directive, or that any such re-review constitutes a meaningful reconsideration of a plan or its terms. (*See, e.g.*, I.W. case) (Tr. 2989; PX T, at 45373-74) (no evidence that DCFS conducted any five-day reviews of safety plan with a stated duration of "up to 60 days.") In any event, DCFS itself concedes that safety plans are intended to be short-term measures, and that limitation must be considered in determining what constitutes a reasonable time to contest a plan. Finally, though this case addresses only safety plans secured by threat of protective custody, the parties should not overlook the importance of uniformity in the safety plan process, even when a family's agreement to a plan is entirely voluntary.

## III.

## IRREPARABLE HARM/BALANCING OF HARM/ PUBLIC INTEREST

Defendant barely addresses the question of irreparable harm, arguing primarily that Plaintiffs are wrong to suggest that the liberty interest in familial relations is "virtually absolute." (Def. Resp., at 54.) In support of this argument, Defendant cites a 1987 case from the Eighth Circuit Court of Appeals, which states that

> parental liberty interest in keeping the family unit intact is not a clearly established right in the context of reasonable suspicion that parents may be abusing their children. If law enforcement personnel who have at least arguable probable cause to believe that adults have been molesting children are not entitled to reasonable belief that

> the adults may pose a danger to their own children, then the law was (and is) not clearly established on this point.

*Myers v. Morris,* 810 F.2d 1437, 1463 (8th Cir.1987). The plaintiffs in *Myers* had been charged by the county attorney with criminal sexual activity involving one or more minor children. They alleged, among other things, that the county prosecutor, county sheriff's deputies, and others caused them to suffer loss of liberty and alienation of affection by arresting the plaintiffs without probable cause and then removing minor children from their homes on "police holds" after the arrests. *Id.* at 1444.

The quoted language above appears in the court's discussion of whether the sheriff's deputies were entitled to qualified immunity from suit. The plaintiffs challenged "the summary removal of children before attempts were made to substantiate incriminating statements of other children through normal investigative techniques." *Id.* at 1462. The sheriff's deputies were entitled to qualified immunity on such claims if there was a "legitimate question" as to the legality of summarily separating children from parents who had been accused of criminal acts towards others. *Id.* The court found there was such a legitimate question given that "other children had described abuse by the arrested persons upon their own children." *Id.* at 1463. Thus, the sheriff's deputies were qualifiedly immune from further litigation. *Id.*

The court does not see how *Myers* is instructive in assessing the balance of hardships between the parties. Plaintiffs have presented ample evidence that they suffered emotional and psychological injury as a result of safety plans lasting for more than a brief or temporary period of time. (Pl. Mem., at 62-77.) The court recognizes the importance of the

state's interest in protecting children from harm, but concludes that this interest does not outweigh the irreparable harm (1) to individuals whose lives are disrupted by safety plans which require family members to live outside the home or which restrict contact between family members for an indefinite or unstated duration; and (2) to individuals who, under an express or implied threat of protective custody, sign safety plans lasting more than a brief or temporary period of time, but have no available means of contesting those plans.

## IV.

## MANDATORY OR PROHIBITORY INJUNCTION

Plaintiffs argue that the court should enter an injunction prohibiting DCFS from implementing safety plans that violate their constitutional rights, "not one that imposes or directs defendant to erect a new administrative scheme for putting safety plans into effect, or permitting class members to contest them." (Pl. Mem., at 85) (citing *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 798 (7th Cir.1995)) (affirming injunction requiring state to comply with "motor voter" law, but finding "no occasion for the entry of a complicated decree that treats the state as an outlaw and requires it to do even more than the 'motor voter' law requires"). In Plaintiffs' view, "neither DCFS (nor the state courts, for that matter) need devise or erect any new remedial structures in order to ensure the provision of such protections: the protections are already in the Juvenile Court Act, and class members may avail themselves of these protections in ordinary course." (Pl. Mem., at 86.) Defendant makes no response to this argument.

The court nevertheless disagrees with Plaintiffs' contention that the appropriate remedy here is simply to enjoin safety plans and mandate compliance with the procedures available under the Juvenile Court Act. The JCA provides for court review only when a child is taken into protective custody, not when DCFS implements a safety plan, and as explained earlier, the court does not believe that all safety plans trigger constitutional concerns as a matter of course. Nevertheless, Plaintiffs are entitled to some opportunity to review restrictions placed on their contacts with their children. Further, the court notes its belief that persons subject to safety plans are entitled to immediate notice of the basis on which the investigator has determined such a plan is necessary, as well as notice of the expected duration of such a plan and an explanation of the process and schedule for seeking review of restrictions imposed by the plan. As for what those procedures should entail, the court, having found a constitutional violation in this case, now defers to DCFS to fashion an appropriate remedy consistent with this opinion. *See Massey v. Helman,* 35 F.Supp.2d 1110, 1115 (C.D.Ill.1999) (citing *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)) ("the [Supreme] Court has deferred to the legislature to fashion appropriate remedies for constitutional violations"). The court suggests that in developing these procedures, DCFS consider whether the procedures adopted for child care workers in *Dupuy I* may be altered or enhanced to address the safety plans at issue here. *See Dupuy v. McDonald,* No. 97 C 4199, 2003 WL 21557911 (N.D.Ill. July 10, 2003). DCFS is also invited to explain the degree to which the 2002 amendments may address concerns raised by this opinion.

## Conclusion

For the reasons stated above, Plaintiffs' motion for a preliminary injunction (Doc. Nos.488-1, 488-2) is granted in part and denied in part. The court agrees that Plaintiffs are entitled to injunctive relief, but declines to categorically enjoin safety plans. DCFS has sixty (60) days to develop constitutionally adequate procedures consistent with this opinion.

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**CHICAGO, ILLINOIS 60604**

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No. 07-1655

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BELINDA DUPUY, *et al.*,
*Plaintiffs-Appellants,*

v.

ERWIN MCEWEN, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES,
*Defendant-Appellee*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 97 C 4199—Rebecca R. Pallmeyer, *Judge.*

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October 15, 2007

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*Before*

HON. FRANK H. EASTERBROOK, *Chief Judge*
HON, RICHARD A. POSNER, *Circuit Judge*
HON TERENCE T. EVANS, *Circuit Judge*

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**Order**

On September 4, 2007, plaintiffs-appellants filed a petition for rehearing with suggestion for

rehearing *en banc*, and on September 19, 2007, defendant-appellee filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED.**